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No. 98-1991

In The

Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL.,

Petitioners,

v.

BRUCE C. BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF ALAMEDA BOOK CLIFF'S RANCH, ARIZONA & NEW MEXICO COALITION OF COUNTIES FOR STABLE ECONOMIC GROWTH, PRODUCTION CREDIT ASSOCIATION OF NEW MEXICO AND NEW MEXICO PUBLIC LANDS COUNCIL *ET AL.* IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Tenth Circuit erred in sustaining two recently adopted federal livestock grazing regulations that had been struck down by the U.S. District Court for the District of Wyoming. The first of these regulations abandoned the adjudicated grazing preference in favor of "permitted use" ("Permitted Use Rule"). The second prospectively vests title in the United States to all range improvements on the public lands. This brief will demonstrate how these regulations will cause pervasive damage to the livestock industry, the financial services industry, the environment and the unique rural cultures of the American West. The parties represented in this brief respectfully request that the U.S. Supreme Court grant certiorari to hear this case.[1]

ISSUES

1. Whether the holder of a Bureau of Land Management ("BLM") grazing preference is entitled to retain his "suspended use" animal unit months ("AUMs") on BLM land, which can be activated if increased forage becomes available (i.e., challenge to Permitted Use Rule); and

2. Whether the regulation prospectively vesting title to all future range improvements in the United States contravenes the Taylor Grazing Act's ("TGA's") purposes and requirements to adequately safeguard recognized privileges in the range and to stabilize the livestock industry (i.e., challenge to Range Improvements Rule).

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. This brief was authored by Karen Budd-Falen and Jeffrey B. Teichert, attorneys of Budd-Falen Law Offices, P.C.

STANDARD OF REVIEW

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." Among these compelling reasons are (1) a decision conflicting with precedent in another circuit; or (2) "an important question of law that has not been, but should be, settled by this court. . . . " *Id.*

While there is technically no split of authority regarding the issues raised in this brief, the Tenth Circuit reversed the U.S. District Court for the District of Wyoming by a bare majority of two votes to one (2-1). The Tenth Circuit's decision was then upheld on a petition for rehearing by an *en banc* court deadlocked at five votes to five (5-5), with two judges abstaining. The resulting precedent will, if permitted to stand, leave public lands grazing jurisprudence in disarray to the severe detriment of the 16 Western states. For example, a coalition of 17 rural counties and one municipality in Arizona and New Mexico unanimously approved a resolution warning that:

> The 10th Circuit panel's decision will have serious adverse social, cultural, economic, physical and biological environmental impacts on the states of Arizona and New Mexico and the Coalition of Arizona/New Mexico member counties.

Resolution Concerning 10th Circuit Decision in *PLC v. Babbitt*, Coalition of Arizona/New Mexico Counties for Stable Economic Growth (October 23, 1998). App. 1-2. The reasons why this case is sufficiently compelling to warrant Supreme Court review will occupy the remainder of this brief.

ARGUMENT

I. The Permitted Use Rule Violates The TGA By Failing To Adequately Safeguard Grazing Privileges

A. The Permitted Use Rule

Under the prior rule, "[g]razing preference means the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned

or controlled by a permittee or lessee," 43 C.F.R. § 4100.0-5 (1994), including "both active and suspended use." 43 C.F.R. § 4110.2-2(a) (1994). Under these regulations, the preference was not an absolute guarantee of livestock numbers, but allowed the rancher the right to utilize the maximum number of AUMs the range would support, up to the preference limit. P. Foss, *Politics and Grass* (Univ. of Washington Press) (1960), App. 12-14. If grazing use ("AUMs") was reduced, the permittee retained the suspended use to be reactivated when forage conditions improved. *Id.* Once established, the grazing preference "is to be regarded as an indefinitely continuing right." *Shufflebarger v. Commissioner*, 24 T.C. 980, 992 (1955).

In contrast, under the Permitted Use Rule, "[p]ermitted use means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs." 43 C.F.R. § 4100.0-5 (1998). The Permitted Use Rule bases grazing decisions solely on land use plans and other decisions, without the guidance of the AUMs historically attached to the permit holder's base property. 43 C.F.R. § 4100.0-5 (1994). Additionally, under the Permitted Use Rule, the permittee is not entitled to reclaim suspended use AUMs if forage improves, even if that improvement is caused by the permittee.

B. The Grazing Preference is a Privilege That Must Be Adequately Safeguarded Under the TGA

The operative language of the TGA is as follows:

> The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners. . . . *Preference shall* be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned,

> occupied, or leased by them. . . . Such permits shall be for a period of not more than ten years, subject to the *preference right of the permittees* to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. . . . So far as consistent with the purposes and provisions of this subchapter, *grazing privileges recognized and acknowledged shall be adequately safeguarded,* but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

43 U.S.C. § 315b (emphasis supplied). The Tenth Circuit mistakenly held that historic preference, allowing the permit holder "to graze predictable numbers of stock from permit to permit," was not a grazing privilege which must be "adequately safeguarded" under the TGA. *Public Lands Council v. Babbitt*, 167 F. 3d 1287, 1294 (10th Cir. 1998). The preference system made authorized grazing numbers predictable by ensuring that the preference holder's share of the available forage, vis-a-vis the share granted to other permittees, would not change. A right of "preference" over other potential users or uses is illusory if the preference does not indicate how large a share of the available forage the holder may claim in "preference" over others. Because the Permitted Use Rule eliminates adjudicated grazing limits, a preference holder is no longer guaranteed a fixed share or percentage of the forage available on his grazing allotment.

Essentially, the Tenth Circuit held that it must follow "the plain meaning of the regulations" rather than "unattributed assertions" that "privileges recognized and acknowledged," 43 U.S.C. § 315b, included historic preference. 167 F.3d at 1297. Thus, the Tenth Circuit left these "privileges" unprotected by its refusal to consider outside sources to supply the scope and substance of the protected "privileges." *Id.*

1. Privileges "[S]afeguarded" Under the TGA Include the Recognition of "[G]razing [P]rivileges [R]ecognized and [A]cknowledged" Because of Prior Use

Although the TGA does not "*create* any right, title, interest, or estate in or to the lands," 43 U.S.C. § 315b (emphasis supplied), it does *safeguard* privileges in the range that already existed by virtue of "previous use of the range." F.R. Carpenter, *Establishing Management Under the Taylor Grazing Act*, address at Montana State College (January 8, 1962), in Rangelands, 1981, App. 14; *Public Lands Council*, 167 F.3d at 1310 (Tacha, J., dissenting, citing *McLean v. BLM*, 133 IBLA 225, 231-32 nn.9-10 (1995)). These privileges were originally adjudicated in a process that took almost 20 years. *Public Lands Council v. United States Dep't of the Interior*, 929 F. Supp. 1436, 1440 (D.Wyo. 1996).[2]

The TGA's policy of recognizing prior use was, essentially, a codification of history. Grazing on western public lands began because the various Homestead Acts failed to provide adequate acreage to support a viable livestock operation in the arid west where forage was sparse. P. Foss, *Politics and Grass* (1960). App. 3-4, 9. Livestock operators therefore resorted to utilizing adjoining public lands for grazing, *id.*, App. 6, 9, and many livestock operators resorted to fencing the unregulated range. *Id.*, App. 6-8. "When the Taylor Grazing Act was passed, these privately owned fences on the public range were considered evidence of prior use of the lands and thus gave the owner preference in obtaining 'range rights' for his livestock." *Id.*, App. 8.

During debate on the TGA, its sponsoring Congressman recognized the validity of grazing rights springing from prior use:

> *There are many vested rights, which should and must be respected and protected, which have grown*

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[2] For a helpful review of the adjudication process, *see* F. Obermiller, *Public Domain Grazing Adjudications Under the Taylor Grazing Act* (paper prepared for this litigation) App. 16-25.

> *up on the range*. There are involved the rights of some who graze across State lines; and, naturally, they do not want those rights destroyed. They do not want to take any chances [by leaving grazing regulation to the states].

78 Cong. Rec. 5372 (1934) (statement of Congressman Taylor) (emphasis supplied).

Farrington Carpenter, the Director of the U.S. Grazing Service, (predecessor agency to the BLM) described the process in this way:

> [T]he Act [TGA] contained a clause that said we should protect prior rights. What were prior rights? *Prior rights were previous use of the range*. . . .
>
> . . . . After many, many battles this is what they finally decided. The rule was finally worked out that anyone who in the 5 years immediately preceding the Taylor Act had used the range in connection with his land, either continuously for 2 years or any 3 years in that period had prior use rights.

Carpenter (emphasis supplied), App. 2; *see also* P. Foss, *Politics and Grass* (1960). App. 14-15.

Approximately three years after the TGA was enacted, the Interior Department issued a formal opinion stating that "prior use of the public lands for grazing purposes in connection with privately held property may be regarded as a most reasonable standard for the granting of grazing privileges." 56 Interior Dec. 62, 64 (1937).

2. The Grazing Preference was Historically Attached to the Permit Holder's Private Base Property and the Number of AUMs in the Preference was Based on the Carrying Capacity of the Permit Holder's Private Land

The grazing preference traditionally included sufficient AUMs so that the rancher could graze the same number of livestock on the public lands as he could on his private land.

> The act [TGA] furnished a clue to the method of allocating grazing privileges. "Preference," said the

> statute, "shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business . . . or owners of water rights. . . . " This clause restricted grazing rights to landowners or owners of water or water rights; the propertyless nomad was thereby eliminated from consideration. The clause "as may be necessary to permit the proper use of lands" was interpreted to mean that *the applicant must have private holdings sufficient to sustain his livestock when they were off the district, and conversely, that the district lands should complement his private holdings*. . . . The director, after meetings with the stockmen, decided upon *an additional system of preferences based on customary past use of federal lands*. This modified "squatter's right" idea was based on the old western common law of "first in time is first in right." The director found legal justification for this concept in the language of the statute which stated "grazing privileges recognized and acknowledged shall be adequately safeguarded."

P. Foss, *Politics and Grass* (1960), App. 10-11; *see also* Penny & Clawson, *Administration of Grazing Districts in The Public Lands* (V. Carstensen, ed., University of Wisconsin Press) (1962) (reprinted from 29 Land Economics 23-34 (1953)). App. 28-29.

The Federal Range Code's definition of "base property" further demonstrates that the preference was to be based on the carrying capacity of the permit holder's private base property. According to the Code, "base property" is:

> Property used for the support of livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed without reference to forest permits or [other] complementary feed.

Federal Range Code § 501.2(e). App. 26. Attaching the preference to the base property furthered the purpose of the TGA to "permit the proper use of lands, water, or water rights

owned, occupied, or leased by [the permittee]." 43 U.S.C. § 315b. This finding recognized the historic dependance of private ranches on the complementary use of public lands. *Id.*; *see also* Federal Range Code § 501.2(e); 501.4(a), App. 26-27.

In summary, the TGA requires that historic preference, the right to utilize available forage subject to the preference limit, is a privilege which must be "adequately safeguarded" within the strictures of the TGA. The preference is based on: (1) historic use of the range; and (2) the carrying capacity of the permit holder's base property.[3] The new regulation issued by the BLM fails to follow these requirements.

C. The Permitted Use Rule Contravenes the TGA's Mandates to Stabilize the Livestock Industry and to Protect the Public Range

1. The Permitted Use Rule Destabilizes the Livestock Industry

The Tenth Circuit mistakenly stated that "[w]hile stabilizing the livestock industry is one of several purposes of the [TGA], PLC and the dissent place far too much weight on this point." *Public Lands Council*, 167 F.3d 1287 at 1298. This statement is incorrect. Congressman Taylor, author of the Taylor Grazing Act, stated that along with range protection and improvement, the purpose of the TGA to "stabilize the livestock industry dependent upon the public range" was "of the greatest and highest possible importance. . . . " 78 Cong. Rec. 5371 (1934); *see also* TGA preamble, 48 Stat. 1269 (uncodified); *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1952); *Red Canyon Sheep v. Ickes*, 98 F.2d 308, 314

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[3] There are minor exceptions to base property ownership requirements. 43 C.F.R. § 4110.1-1 (1997); *see* 43 C.F.R. § 4130.5 (1997) (a grazing permit can be issued to persons who do not own or control base property if they graze livestock for subsistence purposes); 43 C.F.R. § 4130.6-3 (1997) (persons who do not own base property can acquire temporary "trail permits" to allow livestock to graze while crossing public lands).

(D.C. Cir. 1938); *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829, 833 (D.D.C. 1974); Foss, App. 9-12; Penny & Clawson, App. 29. Because the lack of predictable forage was the major destabilizing factor for livestock producers at the time of the TGA's passage, establishing "certainty of tenure" to graze reasonably predictable livestock numbers was considered essential. 78 Cong. Rec. 5374 (1934) (Statement of Rep. De Rouen, quoting Interior Secretary Harold L. Ickes); *Id.* at 5376 (Statement of Rep. DeRouen, quoting Agriculture Secretary H.A. Wallace). According to the Congressional record:

> [To stabilize the stock industry] is to make it possible for a farmer or ranchman engaged in either the cattle or sheep business to know just what range privileges he may expect and how many cattle or sheep he will be allowed to graze on this public domain.

78 Cong. Rec. 6356 (1934).

Even today, the BLM admits that the grazing preference was the TGA's primary mechanism for safeguarding grazing privileges and stabilizing the livestock industry. According to the BLM:

> John Fowler states that historically "federal land policies have encouraged development and investment by the grazing permittee. The TGA provided enhanced stewardship, financially stable communities and livestock industry" (Fowler, 1994). *The key TGA policy is the Grazing Preference, which was adjudicated to provide security of tenure to encourage investment and commitment on the part of the rancher.* In return, TGA states that "Grazing privileges recognized and acknowledged shall be adequately safeguarded. . . . "

Bureau of Land Management, United States Department of the Interior, New Mexico Standards for Public Rangeland Health and Guidelines for Livestock Grazing Management: Draft Statewide Resource Management Plan Amendment/ Environmental Impact Statement (1999) ("New Mexico EIS") (emphasis supplied), App. 51.

Congressman Taylor also explained that providing predictable grazing expectations in federal lands would inspire the confidence of lenders and provide livestock operations with access to badly needed capital:

> I had the honor of being the acting chairman of this committee much of the time we frequently talked over this matter of . . . the stabilization of the stock industry on the public domain. You Members who do not live in that country may not realize that a herd of cattle or a flock of sheep are worth little or nothing unless the owner has a place to graze them; and *in order to build up or maintain and stabilize the stock-raising industry there must be some assurance as to where and what kind of range they may have and depend upon for their stock, what they can definitely rely upon in the way of pasturage*. Otherwise, there would be no permanence to the business. People who have herds would not be safe; they would have no credit with banks for securing money. *They cannot secure money from the banks if they cannot show that they have some definite and sufficient place on the range where their stock may be adequately grazed.*

78 Cong. Rec. 5371 (1934) (emphasis supplied).

According to Agricultural Economics Professor John M. Fowler, even today the elimination of the "grazing preference . . . and adding in its place the term 'permitted use' provides unusual latitude for the BLM to redefine authorized livestock use." J. Fowler, *Statement to the Committee for Energy and Natural Resources [of the] United States Senate on Rangeland Reform '94* (unpublished manuscript presented on May 14, 1994), App. 32; *see also* Affidavit of Frederick J. Obermiller ("Obermiller Aff.") ¶ 8, App. 34. This problem is particularly serious in the Southwest where most BLM grazing permits are tied to water rights serving as base properties. Penny & Clawson, App. 28; Affidavit of John Fowler ("Fowler Aff.") ¶ 10, App. 38-39. Unlike deeded land, a water right on public lands is "virtually useless without a BLM grazing permit" because the water right owner must have a

grazing permit to utilize the water right. Fowler Aff. ¶ 10, App. 38-39. As stated by one court, owners of water rights "have a property interest in the . . . forage rights appurtenant to their water rights" and the denial of a grazing permit needed to access a water right would amount to an uncompensated taking of private property in violation of the Fifth Amendment. *Hage v. United States*, 42 Cl. Ct. 249, 250-57 (Cl. Ct. 1998).

Because the Permitted Use Rule bases public lands stocking decisions on land use planning rather than stable preference adjudications, the assurance of predictable livestock numbers will be eliminated, resulting in drastically reduced loan capital, loan availability and loan size. Obermiller Aff. ¶¶ 7-8, App. 34; Fowler Aff. ¶ 11, App. 39; Affidavit of Jack C. McCall ("McCall Aff.") ¶¶ 6-8, App. 62; Affidavit of Jaqueline A. Buchanan ("Buchanan Aff.") ¶¶ 7-8, App. 70; Affidavit of Jimmie C. Hall ("Hall Aff.") ¶¶ 6-7, App. 74; Letter From Don Kidd, President and CEO of Western Commerce Bank to Connie Brooks (Oct. 29, 1998) ("Kidd") (unpublished), App. 87-90. In fact, as a result of the Permitted Use Rule, a majority of lenders in both the Pacific Northwest and the Southwest will no longer consider BLM grazing privileges in evaluating security for loans. Fowler Aff. ¶ 12, App. 39; McCall Aff. ¶ 8, App. 62.

Additionally, because of the loss of tenure security, BLM grazing permits will also no longer be considered in appraisals of ranch value either for purposes of sale or use of the ranch as collateral for a loan. McCall Aff. ¶ 7, App. 62; Obermiller Aff. ¶ 7, App. 34. Furthermore, young people will no longer be able to obtain financing to enter the ranching profession, which guarantees that the industry will continue to dwindle. Kidd, App. 90. Most BLM ranchers operate on a one to two percent profit margin and are highly vulnerable to small fluctuations in cost or income that result from changes in public policy. Fowler Aff. ¶ 17, App. 40; New Mexico EIS, App. 55-57. Thus, many BLM dependant ranches will be

forced out of business because of probable livestock reductions[4] and the inability to obtain loans. Polley Aff. ¶ 6, App. 92; Buchanan Aff. ¶¶ 8-9, App. 70; McCall Aff. ¶ 7, App. 62; Obermiller Aff. ¶ 10, App. 35.

2. The Permitted Use Rule Places Agricultural Lending Institutions at Risk of Failure

As agricultural operations are driven into insolvency, their preexisting loans will also be placed in default, causing financial losses to agricultural lenders. Buchanan Aff. ¶ 8, App. 70. This problem will likely affect between forty and ninety-five percent of existing BLM dependent loan portfolios. Buchanan Aff. ¶ 8, App. 70; Kidd, App. 89. In some cases, existing debts are secured up to ninety-five percent by BLM grazing permits. Buchanan Aff. ¶ 8, App. 70. If these loans are subjected to "CLASSIFICATION" by Federal Deposit Insurance Corporation ("FDIC"), all banks with significant permit-secured loans will be in danger of default to the Federal Reserve. *Id.* Losses of even twelve to fifteen percent of an institution's loan portfolios would present a serious threat of failure because of the losses themselves, and because of the resulting loss of confidence by underwriters. McCall Aff. ¶ 9, App. 63. If BLM permits are rendered valueless by tenure insecurity, it is reasonable to predict a direct loss of approximately $1,000,000,000 to the BLM dependent livestock industry, which has an aggregate value of approximately $8,000,000,000 to $10,000,000,000. Obermiller Aff. ¶ 9, App. 34-35. Losses will be felt by approximately seventy-five percent of the livestock industry in the Western states.[5] Obermiller Aff. ¶ 11, App. 35.

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[4] Because many costs of production remain constant, livestock reductions increase the per cow cost of production and decrease profits. Obermiller Aff. ¶ 10, App. 35; Affidavit of Adam C. Polley ("Polley Aff.") ¶ 6, App. 92.

[5] The impact of instability in the livestock industry should not be measured only in dollar amounts. The author of the TGA indicated that "the small ranchman" was the interest the TGA was "most concerned about." 78 Cong. Rec. 5373 (1934) (statement of Congressman Taylor); *see also* 78 Cong. Rec. 6364 (1934) (statement of Congressman Taylor).

D. The Permitted Use Rule Presents Grave Threats to Ecosystem Health

"Range improvements are long term investments in the basic land resource that require years to yield a positive return to amortize the dollars invested." New Mexico EIS, App. 55 ; Fowler Aff. ¶ 14, App. 39; McCall Aff. ¶ 10, App. 63. Without the security of tenure provided by the historic grazing preference, permittees will not be willing to invest in range improvements to enhance ecosystem health. Fowler Aff. ¶¶ 14, 16, App. 39-40; McCall Aff. ¶ 10, App. 63. Furthermore, since the government no longer makes a long-term commitment to grazing permittees, lenders can no longer afford the risk of funding permanent improvements that require a considerable time to pay for themselves. Kidd, App. 88; McCall Aff. ¶ 7, App. 64. According to the BLM:

> Healthy ranges cannot be maintained without secure livestock operations. In short, as the range improves in productivity with the help of the rancher, the rancher should re-establish his or her profitability and pay the variable costs. *Once the profitability is achieved, the rancher will invest capital to improve the healthy ranges.* The improved healthy ranges will provide a more secure environment for family and community stability. *With improved security and stability, the rancher will have greater incentive to further invest in public land improvements.*

New Mexico EIS, App. 50-51. (emphasis supplied). The BLM goes on to state:

> The intent of Congress [in passing the TGA] was to provide stockholders with " . . . some type of assurance as to where and what kind of range they may have and depend on in the way of pasturage." (78 Congressional Record) [sic]. The grazing privileges were subsequently adjudicated to determine

who was eligible for a grazing preference. The term "grazing preference" represents a preference for a grazing permit. The grazing preference was attached to the base property of the ranch and was transferred to the party who owned or controlled the base property. The completion of the adjudication process provided predictability and security of tenure to livestock operators. This predictability and certainty in grazing permits provides the security to obtain financing for livestock capital, operations and improvements on the public land.

. . . . Good range management and proper stewardship of the rangeland is ultimately linked to the security and tenure of the adjudicated preference grazing permit/lease, as expressed and demonstrated by a variety of public land research economists (Martin, 1981, Kelso, 1983, Archer, and Snider, 1984). When predictability and certainty are removed, not only do the ranch finances and family suffer, but the incentive for good stewardship and investment into healthy rangeland improvements is thwarted.

New Mexico EIS, App. 52-53. The BLM clearly understands that abolishing the grazing preference is destructive to tenure security, destabilizing to the livestock industry, and devastating to rangeland health in contravention of the TGA. The Permitted Use Rule directly contradicts this understanding.

E. The Permitted Use Rule is a Death Sentence to the Unique Rural Cultures of the West

"The impact from changes to the range livestock industry will be negligible to the urban economies, but highly imposing to the rural counties with large acreage of BLM land." New Mexico EIS, App. 49. This will deprive counties of badly needed revenue for important programs affecting predator control, soil conservation, senior citizens and community centers, and employee salaries. Polley Aff. ¶¶ 7-8, App. 92-93.

"Land is the life and well-being of the rural culture in New Mexico. Working the land is the center piece of their livelihood[.]" New Mexico EIS, App. 53. The unique culture and value systems of the rural West are deeply embedded in a sense of "*place*" meaning "the site or sites marking the life of a person, the story of their life and that of the lives that came before them." *Id.*, App. 54. For the rural peoples of the West, "*place* and identity are virtually inseparable." *Id.* A forced separation of rural people from their lands "would destroy the very identity of those people." *Id.*

The rural cultures of the West include "a bond between people and place that is no less a bond than flesh and blood; it is wholly dependant upon the fabric of land, people, and community being intact and stable." *Id.* "It is within place that the values of a region are cultivated." *Id.*, App. 55. If there is serious instability in the livestock industry, cultural values such as "self-sufficiency, hard work, and other traits, such as community cohesion, cooperation and leadership associated with agrarian communities, could be altered." New Mexico EIS, App. 58-60. A decline in unique rural cultures would result in "the descent toward a less centered, less self-reliant, more homogenous monoculture." *Id.*, App. 58-60. Given the devastating effect of the Permitted Use Rule and its contradiction to the TGA, the Tenth Circuit's decision should be reversed.

II. The Range Improvements Rule Violates the TGA by Destabilizing the Livestock Industry, Failing to Adequately Safeguard Grazing Privileges Based on Water Rights, and Causing Pervasive Damage to the Public Range

A. The Range Improvements Rule

For six decades, the BLM recognized that ranchers who constructed range improvements on the BLM lands held title to these improvements in proportion to their contribution toward the construction or maintenance of the improvement. 43 C.F.R §§ 160.25, 501.27 (1938); 43 C.F.R §§ 160.17, 161.14 (1955); 43 C.F.R § 4115.2-5 (1964); 43 C.F.R.

§ 4120.6 (1978); 43 C.F.R. § 4120.3 (1989); 43 C.F.R. § 4120.3-2 (1994). In 1995, the BLM abruptly reversed this historical recognition and enacted a rule that vested the United States with title to all permanent range improvements authorized after August 21, 1995. The new rule reads, in relevant part:

> Subject to valid existing rights, title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States. The authorization for all new permanent water developments such as spring developments, wells, reservoirs, stock tanks, and pipelines shall be through cooperative range improvement agreements.

43 C.F.R. § 4120.3-2(b) (1998).

B. The Range Improvements Rule Will Significantly Damage Water Property Rights and Attached Grazing Preferences

In order to attach a BLM grazing permit to a water right, the water must be "available and accessible to the authorized livestock when the public lands are used for grazing." 43 C.F.R. § 4100.0-5 (1994). Without the aid of "wells, reservoirs, and other improvements" authorized by Section 4 of the TGA, 43 U.S.C. § 315c ("Section 4"), many water rights would not be "accessible" to livestock. Furthermore, when the BLM excludes livestock from primary water sources to "manage" such areas, improvements such as water pipelines are often necessary to make water "available" to livestock as required for the water to qualify as base property under 43 C.F.R. § 4100.0-5 (1994).

Under a Section 4 permit, ranchers can construct and maintain these range improvements with their own money. These improvements are then owned by the permittee. A permit holder's willingness to pay for an improvement obviates the need to wait for government funding. The Range Improvements Rule eliminates this opportunity by requiring

that "authorization of all new permanent water developments . . . shall be through cooperative range improvement agreements." 43 C.F.R. § 4120.3-2(b) (1998). Title to improvements authorized by cooperative agreements is held by the United States alone. Thus, under this rule, the United States will eventually acquire title to all range improvements because all privately owned improvements will wear out or become inefficient, and replacement will require a new improvement authorization under 43 C.F.R. § 4120.3-1 (1998). *See also* 60 Fed. Reg. 9934 (Feb. 22, 1995).

Notwithstanding the fact that title to range and water improvements is vested in the government, 43 C.F.R. § 4120.3-2(b) (1998), a permittee can be forced to sign a "cooperative range improvement agreement" or risk losing access to his water rights, 43 C.F.R. § 4120.3-1 (1998), and may be forced to "maintain and/or modify range improvements on the public lands. . . . " 43 C.F.R. § 4120.3-1(c) (1998). The fact that the permittee may be required to expend his own funds and effort to construct and maintain improvements which he cannot own, constitutes unjust enrichment in favor of the government and implicates the "takings" clause of the Fifth Amendment.

If the federal government retains title, range improvements also no longer have any collateral value for securing credit. Buchanan Aff. ¶ 10, App. 70-71; McCall Aff. ¶¶ 11-12, App. 63-64; Hall Aff. ¶¶ 8-10, App. 74-75. Lenders will, therefore, be unwilling to loan money to ranchers for projects that would protect and benefit the public range. *Id.* Inevitably, permittees will be unable to obtain loans to construct and maintain the improvements necessary to make water accessible to their livestock.

The fact that private ownership of range improvements is being eliminated clears the way for the BLM to more easily reduce or eliminate permitted grazing. Buchanan Aff. ¶ 12, App. 71; McCall Aff. ¶ 11, App. 63. This possibility raises questions regarding the security of loans to BLM permittees, and makes lending institutions reluctant to do business with ranches. *Id.* The resulting financial destabilization in the livestock industry offends the purposes of the TGA. TGA

preamble, 48 Stat. 1269 (uncodified); 56 Interior Dec. 62 (1937); *Chournos v. United States*, 193 F.2d 321, 323 (10th Cir. 1951); 78 Cong. Rec. 5374 (1934), (statement of Congressman DeRouen); 78 Cong. Rec. 5376 (1934), (statement of Congressman DeRouen).

The extreme importance of water base properties to western livestock grazing cannot be overstated. Almost all of the grazing permits in the Southwest are water based. Fowler Aff. ¶ 10, App. 38-39; Penny & Clawson, App. 28. Because private land is scarce in the Southwest, water rights are virtually the only base properties to which grazing privileges can be attached. The fact that the Range Improvements Rule jeopardizes access to water on public lands is a very serious violation of the BLM's duty to adequately safeguard grazing privileges under the TGA.

C. The Range Improvements Rule Discourages the Construction of Range Improvements and Encourages Environmental Degradation

As stated above, "range improvements are long term investments in the basic land resource that require years to yield a positive return to amortize the dollars invested." New Mexico EIS, App. 55; Fowler Aff. ¶ 14, App. 39-40. However, ranchers will not be willing to invest in range improvements if they cannot hold title to them. As discussed at the Senate Committee for Energy and Natural Resources:

> STEWARDSHIP DISINCENTIVES
>
> Removing private incentive for investing in federal rangeland by retaining federal ownership of improvements and water rights, eliminating equity and increasing annual costs will not encourage better stewardship. The federal government will have to fill the void in management and investment; this will be extremely difficult in an era of reduced funding and down-sizing of agencies.

> *Improvements*:
>
> The regulations as proposed have two distinct provisions that will preclude economically justifiable longterm private sector investment in federal rangelands. The first disincentive is that permanent improvements and temporary improvements will be retained in ownership by the United States; this holds for all future permanent improvements and any temporary improvement if *any* portion of its cost was borne by the United States. In addition, exclusive right to use the improvement is not conferred. Even with a 10 year permit the long run nature of the improvement will not allow the private sector to recapture dollars expended.
>
> . . . .
>
> Market value of federal permits will further decline as this value is a reflection of carrying capacity and improvements.

J. Fowler, *Statement to the Committee for Energy and Natural Resources [of the] United States Senate on Rangeland Reform '94* (unpublished manuscript presented on May 14, 1994), App. 30-31; Fowler Aff. ¶ 14, App. 39-40; Obermiller Aff. ¶ 13, App. 35; Polley Aff. ¶ 8, App. 92-93; McCall Aff. ¶ 10, App. 63. In 1986, the State of New Mexico, took title to all future livestock water developments on state lands. Fowler Aff. ¶ 15, App. 40; Fowler, *supra* manuscript, App. 31. Since that rule was adopted, livestock permittees on state lands have literally made *no* livestock water improvements. *Id.*

The Range Improvements Rule is likely to have a similarly drastic result throughout BLM lands. Fowler Aff. ¶ 15, App. 40; Polley Aff. ¶ 9, App. 93; McCall Aff. ¶ 10, App. 63. When this occurs, the BLM simply will not have the manpower or financial resources to construct all of the necessary range improvements. Fowler Aff. ¶ 16, App. 40; Fowler, *supra* manuscript, App. 30. Thus, the Range Improvement Rule's discouragement of improvements is likely to result in serious environmental damage. Fowler Aff. ¶ 16, App. 40; McCall Aff. ¶ 10, App. 63.

CONCLUSION

The Supreme Court should hear this case because of its grave implications for the culture and economy of every Western state with significant acreage of public lands, its destabilizing effect on the entire Western livestock industry, and its potentially devastating impact on the natural environment.

RESPECTFULLY SUBMITTED this 10th day of September, 1999.

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APPENDIX

Coalition Of Arizona/
New Mexico Counties
For Stable Economic
Growth

RESOLUTION CONCERNING 10th CIRCUIT DECISION IN PLC V. BABBITT

WHEREAS, the 10th Circuit Court of Appeals has issued a ruling in the case PLC v. Babbitt; and

WHEREAS, the four regulations at issue in this case were: (1) the use of the terms "grazing preference" and "permitted use" to denote priorities and specify grazing use for purposes of issuing grazing permits (permitted use rule); (2) ownership of title to range improvements (range improvements rule); (3) the elimination of the requirement that applicants for permits must "be engaged in the livestock business" (qualifications rule); and (4) the issuance of permits for "conservation use" in addition to permits for the grazing of livestock (conservation use rule); and

WHEREAS, the 10th Circuit reversed the Wyoming District Court's invalidation of the permitted use rule, the range improvements rule, and the qualifications rule; and

WHEREAS, the 10th Circuit panel's decision will have serious adverse social, cultural, economic, physical and biological environmental impacts on the states of Arizona

and New Mexico and the Coalition of Arizona/New Mexico member Counties[1].

THEREFORE, BE IT RESOLVED that the Coalition of Arizona/New Mexico Counties disagrees with the 10th Circuit's panel decision to reverse the Wyoming District Court's ruling and request an en banc reconsideration by the 10th Circuit.

Done this 23rd day of October, 1998 by a unanimous vote of the Board of Directors.

/s/ Leslie E. Thompson
Leslie E. Thompson, President

[1] The Coalition is comprised of the Arizona Counties of Apache, Cochise, Gila, Graham, Greenlee and Navajo, the New Mexico Counties of Catron, Chaves, Eddy Harding, Hidalgo., Lincoln, Luna, Otero, Sierra, Socorro, Torrance and Union and the Town of Sierra Vista, Az.

P. Foss, Politics and Grass

* * *

Grazing Homesteads

The high casualty rate among homesteaders did not deter other millions of innocents from filing new homestead claims. As the years passed the western range was being steadily fenced off and pushed back. During this same period stockmen had sponsored bills to allow leasing of federal lands and prevent or minimize homesteading.[55] But Congressmen still clung to a sort of sentimental belief in homesteading and to suspicion of the western cattle "barons" who had used the range so long.

At the same time Congress finally realized that the existing homestead acts were no longer practical – if they ever had been. Consequently, the size of homesteads was increased to 640 acres in the Stockraising Homestead Act of 1916.

Once again, Congress had acted too late with too little. The enlarged homestead (320 acres) would have been a practical acreage at one period in the settlement of the West but by the time of passage that period had passed, and the acreage was inadequate. Later on a 640-acre homestead might have been practical but when the act was finally passed it was again too late. In 1916 the remaining public land was generally of such low productivity that 640 acres was inadequate to support a family.

The act is particularly significant, however, because it was the first act of Congress to deal specifically with the land problems of people who earned their living by grazing livestock. Prior to this time the stockman had been

regarded as a "trespasser on the public domain, an obstacle to settlement, and at best but a crude forerunner of civilization of which the farmer was the advance guard and the hoe the symbol."[56]

Even so the act did not in reality apply to western stockmen as a whole. It lured into the desert a group of farmers to whom 640 acres sounded like a lot of land. Their entry on the range usually meant that the old stockman was fenced off while the homesteader overgrazed his homestead section in an attempt to make a living or until he abandoned his claim, sold out to a stockman, or was able to add sufficient territory to his homestead to enable him to stay in business. In an attempt to control strategic points on the range, stockmen or their employes also entered claims to grazing homesteads.

The Grazing Homestead Act continued in force until the passage of the Taylor Grazing Act, which had the effect of superseding and nullifying it. The former was the last of major public-land disposal methods. It concluded a long series of congressional land acts which, from our vantage point in time, appear to have been inept and impractical.

We have noted in passing some of the social costs of unsuitable land policies. We turn now to a consideration of the effects of these policies on western landownership patterns, on the western livestock industry, and on the land itself.

Results of Land Policies on Ownership Patterns

The system of rectangular land surveys, in conjunction with the homesteads, sales, and grants, resulted initially in landownership patterns scattered out into little squares of 160 or 640 acres. These surveyor's squares were, of course, superimposed upon the landscape without regard to topography. We have lived with this system of land surveying so long that it may seem to be the natural and logical method. Possibly it was the most logical method in the eastern part of the United States. In the West, however, this method of surveying lands created problems of land disposal, landownership, and land use. Major John W. Powell, in his *Report on the Lands of the Arid Region of the United States,* recognized the difficulties for the West inherent in the rectangular survey system:

> Many a brook which runs but a short distance will afford sufficient water for a number of pasturage farms; but if the lands are surveyed in regular tracts as square miles or townships, all the water sufficient for a number of pasturage farms may fall entirely within one district. If the lands are thus surveyed, only the divisions having water will be taken, and the farmer obtaining title to such a division or farm could practically occupy all the country adjacent by owning the water necessary to its use. For this reason divisional surveys should conform to the topography, and be so made as to give the greatest number of water fronts.[57]

As could be expected, the watering places were the first to be transferred to private ownership. according to Clawson:

> As the range became crowded with range livestock, but generally before the intrusion of farmers, some ranchers began to protect themselves by acquisition of "key tracts." The key tract often contained the only available stock water for some distance. By preventing trespass on the land he owned, the rancher could obtain exclusive use of all the grazing land that could be used by livestock watering on his land. This process was usually effective.[58]

When an individual owned a "key" tract it meant not only that he had free use of the adjoining public lands but also that ordinarily those lands would not be desired by anyone else. As a consequence, much more public land remained in the hands of the government than would have been the case if the lands had been surveyed and distributed according to topographical features.

As pressure for grazing land increased, stockmen began to buy blocks of railroad lands. It will be recalled that the railroads were granted lands by alternate sections, so that their ownership pattern resembled a checkerboard. By purchasing a block of these checkerboarded lands the stockman also acquired the free use of the alternate sections of public domain. In effect, he got two for the price of one.[59]

East of the Mississippi, where land enclosures were generally small, lands were ordinarily fenced with stone, rails, or dense hedges. In the West these methods were impractical because of the large areas involved and the lack of wood for rail fences. In 1874, however, J. F. Glidden of DeKalb, Illinois, patented a successful barbed wire fence and a machine for making it. By 1880 barbed wire

factories were turning out 40,000 tons of this cheap fencing material; by 1890 this output had been tripled.[60] Western stockmen were quick to take advantage of this new method of controlling the public range. Two Colorado cattle companies were reported to have fenced off a million acres each of government land. Three million acres were fenced off in two New Mexico counties. Smaller, but still considerable, amounts of fenced government lands were reported in other range states.[61]

By 1885 fencing of public lands had become so prevalent and complaints so numerous that congress passed a law making illegal the erection of any obstacle to free passage on the public domain.[62] The next year President Cleveland ordered the removal of all fences, and the Secretary of Interior moved to carry out his orders.[63] By 1891 the Commissioner of the General Land Office was able to state that only thirteen cases of illegal enclosure of public lands had been reported during the previous year and that these cases had involved only 34,358 acres.[64]

The illegal fences had some stabilizing influence on the range. Stockmen made some attempt to manage fenced public domain lands. With the passage and enforcement of the act of 1885, however, the range once more became wide open to the first comer. By mutual agreements stockmen were sometimes able to keep out of each other's way, but sooner or later someone would slip over the boundaries and range wars would result. Nomadic sheep operators generally ignored local agreements and grazed wherever they were strong enough to stay. When they were forced off one range they moved to another and repeated the process.

After the first years of enforcement of the law of 1885, stockmen gradually began fencing off the public domain again. When complaints of illegal fencing became serious enough the government caused the fences to be removed but when the pressure was off they were usually built up again. When the Taylor Grazing Act was passed, these privately owned fences on the public range were considered evidence of prior use of the lands and thus gave the owner preference in obtaining "range rights" for his livestock.

Many of the homesteaders who were able to stay on their claims long enough to gain title later gave up and moved off the land but retained title to it. During the big cattle boom many eastern and foreign companies, as well as western stockmen, acquired large tracts and later went into bankruptcy, with the lands passing into the hands of their creditors. We have already noted the grants of land to states and railroads. Part of these lands are retained by their original owners. All these factors have contributed to a situation in the West where much of the land is held by absentee owners in parcels of various sizes and is rented, leased, or used without charge by local stockmen. Such leased or vacant land is ordinarily overgrazed and has deteriorated considerably.

Results of Land Policies on Stockmen's Tenure and Methods

The old lawless West of range wars and conflicts between homesteaders and stockmen, and between cattlemen and sheepmen, was lawless not because it was populated by a peculiar breed of hyperaggressive and unscrupulous people, but because of political acts which

resulted in land policies that were not suited to the region and that had the effect of encouraging conflict, insecurity, and disrespect for law.

Congress offered the homesteader a piece of land so small that he was forced to use public land that did not belong to him. When he used public land be came into conflict with others who desired to use the same land and whose legal (or illegal) rights were as good as his. Since this was an illegal or extralegal matter, there existed no means of arbitrating or settling disputes except by mutual agreement or conflict.

When stockmen were able to agree on a division of the public range, they found their plans thwarted by the homesteader who had a legal right which they did not possess. But the homesteader enjoyed a legal right only on his claim, and this was usually insufficient to provide a livelihood. So he did the same thing the old stockman did: he ran his cattle on the public domain. In so doing he had not only deprived the pioneer stockman of the area within his homestead but also competed with the stockman for the public domain. If and when he became established, he resented the intrusion of succeeding homesteaders as much as did the oldtime cattleman.

* * *

Range "Rights"

The avowed purposes of the Taylor Grazing Act were to "stop injury to the public grazing lands by preventing overgrazing" and to "stabilize the livestock industry dependent upon the public range." To carry out these purposes it was first necessary to determine the grazing

capacity of the district – that is, the maximum number of livestock that could be grazed without injury to the range.

* * *

The act furnished a clue to the method of allocating grazing privileges. "Preference," said the statute, "shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business . . . or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them."[78] This clause restricted grazing rights to landowners or owners of water or water rights; the propertyless nomad was thereby eliminated from consideration. The clause, "as may be necessary to permit the proper use of lands" was interpreted to mean that the applicant must have private holdings sufficient to sustain his livestock when they were off the district, and conversely, that the district lands should complement his private holdings.[79] The words "in or near a district" caused considerable dispute at first because some operators had customarily trucked cattle in or had driven stock for long distances. But after these requirements of the statute had been satisfied, there was still "three times as much private land devoted to supporting livestock which was 'in or near a district,' as there was range to complement such private lands and give them a 'proper use,' "[80] so some additional restrictive device was necessary. The director, after meetings with the stockmen, decided upon an additional system of preferences based on customary past use of the federal lands. This modified "squatter's right" idea was based on the old western common law of "first in time is

first in right."[81] The director found legal justification for this concept in the language of the statute which stated "grazing privileges recognized and acknowledged shall be adequately safeguarded."[82]

Since it was impractical and impossible to determine who was originally "first in time" on the range a "priority period" was established as the five years immediately prior to passage of the act. A stockman who had made substantial use of the public range in connection with his private properties for two consecutive years or any three years during this priority period had priority "rights."

In summary, preference in obtaining grazing privileges was accorded to owners of land or water who could support their livestock during the seasons when they were off the grazing district, who required the federal lands in conjunction with their own to form an economic ranching unit, and who had used the range during the priority period.

* * *

Finally a range regulatory bill, the Taylor Grazing act, was passed in 1934. The avowed purposes of the act were to stop further injury to the public lands, to provide for their orderly use and development, and to stabilize the livestock industry dependent on them. The Secretary of Interior was authorized to carry out these objectives by the establishment of grazing districts and the issuance of grazing permits to qualified applicants for a "reasonable" fee.

Preference in awarding grazing permits was given to those stockmen who lived "in or near" a grazing district,

who owned private lands capable of supporting their livestock when they were off the district (commensurate properties), and who had a history of use of the public range during the five years immediately prior to the passage of the act.

The permit system automatically disqualified nomadic stockmen, those who did not own commensurate properties "in or near" a grazing district and those who had not used the range during the priority period.

* * *

On the basis of this arrangement both class 1 and class 2 applicants were "set-up" in the district office records on an equal basis for the full amount their base properties would support. In other words, priority rights were ignored and the estimated carrying capacity of the unit was also ignored. Commensurate base property was the only factor considered. The total of these commensurate base property rights for Soldier Creek amounted to 77, 419 A.U.M.'s. However, it was recognized that the unit would not support this total. The advisory board estimated the carrying capacity of the unit at 43,260 A.U.M.'s.[16] Ross has insisted, over the years, that the estimated carrying capacity was 45,000 A.U.M.'s but both the board and the administration generally accepted the 43,260 figure. The applicants agreed that the 77,419 figure would be used only as a starting point for making the downward adjustments necessary to keep licensed use within the carrying capacity of the unit. However, each permittee's "rights" were not *proportionately* reduced. Each permittee still had "rights," on paper at least, for the full amount his commensurate properties would support.

There were two reasons, in 1943, for not proportionately reducing each permittee's "rights" to bring the total down to the estimated carrying capacity of the unit. First, the stockmen planned eventually to build bridges across the Owyhee Canyon and consolidate the Jackie's Butte area with Soldier Creek.[17] If this had been accomplished, the total capacity of Soldier Creek would have been increased considerably. Secondly, this system, or lack of system, permitted more flexibility in allocating annual licensed use. Thus, in a particular year, operator A might not desire to use the range at all so operator B could conceivably be licensed for the total amount his base properties would support.

* * *

F. R. Carpenter, Establishing Management Under the Taylor Grazing Act

* * *

Well fortunately or unfortunately, the Act contained a clause that said we should respect prior rights. What were prior rights? Prior rights were previous use of the range. These sheepmen had the range for 20 years. Maybe some operator had just bought an outfit the year before. So all the fellows that had been on 5 years voted for 5 years. All the fellows that had only been on 1 year voted for 1 year. Each fellow was voting so that he got on. What were you going to do? What was going to be the role of prior rights. How much prior use of the range did you have to have in order to submit your commensurability right and get a permit? I didn't know what to say. So the first year we said, "Now we'll tell you how we are going to do this. The Board meets and your to 10 representative sheepmen are there, your 10 representative cowboys are there and you're going to have to agree by 2/3 majority on some rule for prior use of the range and that first year that rule will apply to that district. And every district will vote their own rule and then we'll all get together in Salt Lake City at the Hotel Utah in the ballroom and we'll fight it out and we'll have one rule for the United States."

So then they started out. Here was a district that was largely all old-time operators, and they had no trouble voting the rule that you had to show 20 years continuous use of the range. Well then some of them found out they hadn't used it continuously. So they said 15 out of 20 years gives you a prior right. There were other sanctions of the range for one reason or another had just been

opened up. These operators said anybody using it last year should have prior rights. The Act went in effect June 28, 1934, so anybody using it in 1933 should have the prior rights. Well it sounded pretty good but then a man came in and said, "My wife had a stroke that year and I had to move down to Arizona. I let my neighbors use that range and I didn't use the range in 1933 but I've been here all my life. Are you going to kick me out?" Well we couldn't go that way. So the really hot battle in setting up the regulations of the Taylor Act was what was prior use of the range. And we were close to 3 years solving it. After we solved it for the north, it wouldn't go in the south because of the water rights. In the south it didn't matter how long you had used the range, if you didn't have water rights you couldn't continue to use it.

So we had to reach a conclusion. After many, many battles this is what they finally decided. The rule was finally worked out that anyone who in the 5 years immediately preceding the passage of the Taylor Act had used the range in connection with his land, either, continuously for 2 years or any 3 years in that period had prior use rights.

* * *

Public Domain Grazing Adjudications Under the Taylor Grazing Act

Frederick W. Obermiller
Oregon State University
October 30, 1998

A history of grazing forage adjudications based on "Range Surveys" conducted by the predecessors of the Bureau of Land Management currently is being compiled by Bureau of Land Management Land Law Historian James Muhn who is with the BLM Service Center in Denver, Colorado.[1] The original surveys and adjudications were directed by the Division of Grazing Control organized in 1934, renamed the Division of Grazing in 1935, and again renamed the Grazing Service in 1938 – all of which were units of the United States Department of the Interior organized for the purpose of implementing the Taylor Grazing Act of 1934 (43 U.S.C. 315). The Bureau of Land Management (BLM) is the modern successor to these earlier units, created through merger of the Grazing Service and the General Land Office in 1946.

Although the historical record is both clear and decisive in its documentation of the public domain grazing adjudication process, nonetheless some have questioned whether, in fact, such an adjudication ever happened. For example:

> The dissent attempts to find [prior recognition of adjudicated grazing preferences] in its own "historical understanding of grazing preferences and the importance that they assumed in the

[1] Personal communication with the author, October 29, 1998.

> operation of permittees' livestock businesses . . . *Without citation to any authority,* the dissent then describes at length a process whereby the Secretary made permit renewal decisions by "reference to" or in "recognition of" the original grazing adjudications. We know of no principle of administrative law that allows us to substitute our own *unattributed assertions* for the plain meaning of the regulations in seeking to review a regulatory scheme." [emphasis added] (10th Cir. Filing No. 96-8083, *Public Lands Council et. al. v. Babbitt et. al.* September 1, 1998)

The purpose of this short statement is to provide the authority for the assertions by the dissent in the above-captioned case. This is easy to do.

Grazing Adjudication Described by Professor Foss in Politics and Grass

First, we have the detailed description of the adjudication process provided by Professor Foss.[2]

> F. R. Carpenter [first Director of the Division of Grazing (Control)] expressed it this way: The Taylor Act says preference rights shall be given "FOR THE PROPER USE OF LANDS." Not of people; not the proper use of the livestock, but of the LANDS . . . these rights will be given to you not as individuals, nor as owners of livestock – we do not care how many cattle or sheep you have or how much experience or lack of experience you have in the livestock business.

[2] Phillip O. Foss, 1960, *Politics and Grass*, Seattle: University of Washington Press.

> We care only for your lands. We want to build up your lands and give them stability and value. In doing that we wish to give them the adjunctive pasture rights which naturally belong to them, and in proportion to their carrying capacity, fertility and crop yield.[3]

Foss states that BLM permittees may transfer their public domain grazing rights together with, or as an appurtenance to, their commensurate privately owned lands. In this manner, grazing rights are usufructuary property interests standing as incidents to private property, as, for example, are irrigation ditch rights-of-way incidents to diversionary water rights.

Then, Foss describes the manner in which the scope, or quantity, of adjudicated usufructuary grazing rights were originally determined.

> The original carrying capacity of the districts was usually established by estimates of the [grazing district] advisory boards, since funds and personnel were not initially available to make scientific *range surveys*. Probably most of the boards tended to overrate the capacity of the range, but some limits had to be set, and this was probably the quickest and best method available under the circumstances. If scientific surveys later disagreed with the board's original estimate, a new carrying capacity was established and the number of animals licensed on each permit was adjusted accordingly." [emphasis added] (Foss, page 64)

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[3] Transcript of remarks of F. R. Carpenter, Director, Division of Grazing Control, Vale, Oregon, December 15, 1934, pages 32, 39-40.

Foss goes on to describe in detail the adjudication and appeals processes, at which point he states that grazing permits are not issued unless and until both the scope of the grazing forage right is determined via the range survey and the seniority of the user is established.

> Grazing permits [licenses] are issued on a year-to-year basis until such time as the grazing capacity of the range is established, the character and amount of base property is substantiated, and livestock operations have become generally stabilized. Once these objectives have been accomplished, term permits may be issued for periods up to ten years." (Id., page 67)

To further substantiate the compensable value of the adjudicated grazing right, consider the following statement by Foss:

> When the Taylor Grazing Act was in the process of passage, Senator McCarran of Nevada proposed an amendment which was incorporated in the act. The amendment read: " . . . except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan." (Id., page 68)

This clause in the Taylor Grazing Act is meant to preclude the administrator of the act (i.e., the Secretary, Director, or any authorized officer) from canceling or reducing the scope of a grazing permit if such cancellation or reduction would reduce the carrying capacity, hence the value, of the ranch unit serving as collateral for a loan.

Foss provides an illustration of the advisory board judgmental-quasi-judicial/adjudicatory process in establishing the scope of grazing rights or preference in a later chapter (Chapter 7 – The Battle of Soldier Creek) in his book. (Foss, pages 140-170)[4]

The "Range Survey" as the Basis for Grazing Adjudication

Yet, one may ask, should exclusive reliance be placed on the writings of a professor from what is essentially a non-public lands state? To be definitive, a deeper net must be cast. Enter the approximately semi-annual *The Grazing Bulletin,* an official report of the Division of Grazing, and, later, of the Grazing Service.

The first detailed report of the existence and purpose of the "Range Survey" appears in Vol. 1, No. 3, published in September, 1936, and reproduced in full in Attachment A to this statement. In essence, the 1936 report says that a detailed inventory ("Range Survey") of the carrying capacity of all lands within grazing districts, existing range improvements by type of improvement (fencing, water developments, irrigation canals, etc.), and the production capability of associated commensurate base properties is badly needed in order to effectuate the issuance of long-term grazing permits. that survey is to commence immediately in two trial areas: District 5 in New Mexico and District 6 in Colorado.

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[4] Foss's sources are the Act itself, the *Annual Report of the Secretary of the Interior,* 1935, and other citations given on pages 214 and 215 of his book.

> There seems to be very little doubt in the minds of the majority of the board members and the Division of Grazing personnel that simple but effective management plans must be prepared. It is the primary purpose of the range survey program to furnish all of the factual material needed in the preparation of plans for making a proper use of all available resources. There is little question that such plans based on actual facts, incorporating all the knowledge of local conditions supplied by the advisory board members and correlated by experienced range administrators, would be the best obtainable. (page 13)

The New Mexico District 5 range survey was completed and reported in full in Vol. 1, No. 5 of *The Grazing Bulletin.* The preface to the report states that the range survey was "assembled preparatory to determination of preferences for term permits under section 3 of the act of June 28, 1934 (48 Stat. 1296) as amended June 26, 1936 (49 Stat. 1976)," i.e., the Taylor Grazing Act, as amended. (Id., page 1). The first ten year term permits were to be issued in 1939.

> At the time the Taylor Grazing Act was passed, accurate data were not available either as to the proper carrying capacity of the public range or as to the carrying capacity and facilities of private properties used in connection therewith. Range surveys in all of the ten States were begun by the Division of Grazing shortly after the creation of the first grazing district in 1935. The survey of two typical district, one in the south where water controls the use of the range and one in the north where feed controls the use of the range, has been carried to completion in

order *to furnish the facts upon which to establish the principle governing the issuance of term permits.*

The results of the survey and study of New Mexico Grazing District No. 5 are presented herewith and show that prior to the passage of the Taylor Grazing Act 98.4 percent of the public range within that district was properly serviced with artificially developed water and that *the issuance of grazing term permits in that district based upon a proper valuation of such water will by* [sic] *accepted by all of the local users as a fair and proper distribution of public range.* [emphasis added] (Id., page 2)

The purpose of the Taylor Grazing Act was said to be, in part, stabilization of the public land dependent livestock industry by affording ranchers assurance of exclusive grazing rights based on the principle of prior possession, and that the range survey would establish the scope, or amount, of forage to which each such prior user would be entitled. (Id., page 4)

Upon the recommendation of the advisory boards and the approval of the regional grazier, permits for a period not to exceed ten years will be issued. As there are many factors involved, however, *permits* of this nature *cannot be issued until all necessary data are obtained.* This includes the carrying capacity of the public range and the set-up of each applicant. Essentially, *a systematic inventory of range and ranch is necessary for equitable determination of range privileges.*

Rules approved by the Secretary of the Interior March 2, 1936, provided that "permits within section 3 of the act . . . shall be issued as soon as the necessary data are available upon which to

ascertain the proper use of the lands and water which entitle their owners, occupants, or lessees to preferential grazing privilege. During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts." As amended January 28, 1937, *authority to issue temporary licenses was continued in each grazing district until such time as necessary data are available upon which to issue permits. Meanwhile a range survey program of sufficient scope to obtain all basic facts was underway.* [emphasis added] (Id., page 4)

In short, the range surveys were detailed land use analyses consisting of maps, charts, and data used to decide which public land ranchers were to receive spatially fixed grazing allotments containing specified quantities of forage – preference AUMs incident to federal ranges customarily used by ranchers who owned or controlled private land and/or water rights. Prior to issuance of term permits, forage adjudication was required, and so annual temporary grazing licenses were issued pending resolution of complete public domain forage use claims.

The authority of the Secretary to issue temporary licenses pending the issuance of ten year term permits was upheld by the U.S. Supreme Court in *Brooks v. Dewar et al.*, 313 U.S. 979 (1941). In reality, there was little alternative other that [sic] to grant temporary licences while the grazing adjudication process was underway for, as Director Carpenter noted within weeks of his appointment as the first Director in 1934.

The Taylor Act, Public No. 482, provides in Sec. 3, that the Secretary of the Interior can issue

permits to graze livestock on the public domain, for not to exceed ten years.

In further provides in said section that the renewal of permits once issued shall not be denied if they would impair the value of the grazing unit of the permittee when the same is pledged as security for any bona fide loan.

As 90% of the applicants for permits have bona fide loans on their stuff, any and all permits issued will become irrevocable for all practical purposes. This will in a practical way defeat many of the benefits which the Act means to confer to the permittees on grazing districts. Furthermore in setting these districts up, it is impossible to get sufficient data to issue a longer than one year permit at a time under the going concerns. Nevertheless, a one year permit under the above provision would become as irrevocable and ultimately as unjust to the other users of the range as a ten year permit.

> In order to avoid this obstacle I would like to issue a revocable temporary grazing license for a period of not to exceed one year without the entailment of any fee, and as a preparatory measure and trial before issuing permits.[5]

In a responding letter to Director Carpenter dated September 21, 1934, Solicitor Margold responded in the affirmative, "I am of the opinion, therefore, that temporary, revocable grazing licenses for the necessary period of adjustment are legally justified, and that if the licenses as

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[5] Letter from Director of Grazing F. R. Carpenter to Nathan Margold, Solicitor, Department of the Interior, September 12, 1934.

issued so specify they will be free from the nonrevocable conditions set out in the act.

PART 501 – THE FEDERAL RANGE CODE

Section 501.2(e)

* * *

(e) Base property. Property used for the support of the livestock for which a grazing privilege is sought and on the basis of which the extent of a license or permit is computed, without reference to forest permits or complementary feed.

* * *

Section 501.4 Rating and classification of properties – (a) Base properties; classes; carrying capacity of land; service value of water. For the purpose of determining the proper use of the base properties of all applicants and their relative dependence upon the Federal range, water conditions and other factors affecting livestock operations in the area will be considered. Base properties will be classified as land or water and further in the following manner:

Class 1. Forage land dependent by both location and use, and full-time prior water.

Class 2. Forage land dependent by use only, and full-time water.

Class 3. Forage land dependent by location only, and full-time water which otherwise would be in class 2 but which was developed later than other water servicing a part or all of the same area.

Base property which is forage land will be rated, for its carrying capacity. Water will be rated for its service value by deducting therefrom the carrying capacity of half of the area serviced jointly by competing water of the same class, and the carrying capacity of all private or State land located within such service area and not owned or controlled by the applicant. In computing the service value of water in class 3, there will also be deducted therefrom the carrying capacity of any portion of its service area which is serviceable from any other full-time water antedating it in development.

* * *

Penny and Clawson, Administration of Grazing Districts in the Public Land

* * *

Possession of sufficient privately owned or controlled base property, land or water, to insure a year-round operation for the permitted livestock, was required of all users. In areas where private land is the backbone of ranching operations, land was considered as the base property. In such areas the permitted livestock was required to spend a specified amount of time on the private land being offered as a basis for securing grazing privileges. However, in the arid southwestern United States water is considered the principal basis for receiving grazing privileges. Applicants there were required to have privately owned or controlled water suitable for consumption by livestock and available, accessible, and adequate during those months for which the range was classified as suitable for use.

Preference for grazing privileges was given operators who made substantial grazing use of the public lands in connection with their private properties for two consecutive years or any three years in the five years preceding the Taylor Grazing Act (known as the "priority period," June 28, 1929, to June 28, 1934). For districts established or for additions to districts after June 28, 1938, the priority period for land base property is the five years immediately preceding the date of the order establishing them. This provision was extended to water base property on March 16, 1942. Thus grazing privileges were attached to the land rather than to the individual or the livestock.[12]

By later amendment provision was made for the transfer of grazing privileges from one property to another.

The amount of available forage to be apportioned was at first estimated very largely upon the knowledge and advice of advisory boards. These estimates, although often too liberal, in a surprising number of cases were in accord with detailed range surveys and studies made later. They were altered or supported according to those findings.

* * *

Grazing privileges within grazing districts have the distinction of being tied to dependent base property. The transferring of these privileges under Bureau of Land Management administration is unique. Operators owning properties without privileges benefit by acquiring privileges through transfer from other properties. Livestock operations may be stabilized by transferring privileges from leased to owned lands or from relatively unproductive to highly productive lands.

* * *

Dr. John M. Fowler, Statement to the Committee for Energy and Natural Resources United States Senate on Rangeland Reform '94 Presented on May 14, 1994 Albuquerque, New Mexico

* * *

STEWARDSHIP DISINCENTIVES:

Removing private incentive for investing in federal rangeland by retaining federal ownership of improvements and water rights, eliminating equity, and increasing annual costs will not encourage better stewardship. The federal government will have to fill the void in management and investment; this will be extremely difficult in an era of reduced funding and down-sizing of agencies.

Improvements:

The regulations as proposed have two distinct provisions that will preclude economically justifiable long term private sector investment in federal rangelands. The first disincentive is that permanent improvements and temporary improvements will be retained in ownership by the United States; this holds for all future permanent improvements and any temporary improvement if *any* portion of its cost was borne by the United States. In addition, exclusive right to use the improvement is not conferred. Even with a 10 year permit the long run nature of the improvement will not allow the private sector to recapture dollars expended.

Figure 1 readily displays the reluctance of the private sector to invest in improvements. Since the peak level of

private investment in 1985 of 2.5 million, the private sector has reduced its investment level until it now represents only 26% of the former level. This reduction in private sector investment is hypothesized to continue further. On a per AUM basis the reduction has been from $.22/AUM to $.15/AUM.

Market value of federal permits will further decline as this value is a reflection of carrying capacity and improvements.

Will the record of contributed funds that shall be documented by the authorized officer be used to compensate the permittee if his/her permit is not cancelled but rather is forfeited if the fee is perceived to be too high too allow continuation in the range livestock business?

Water Developments:

The proposed water right language that any water right acquired to use water on public land for the purpose of livestock watering shall be acquired, perfected, maintained and administered in the name of the United States is a further disincentive to private investment from the range livestock sector. Similar language passed by the State Lands Office (SLO) in 1987 reveals some interesting results. Of the 20 water developments on file with the SLO since 1987 not a single development has been issued for the purpose of a stock watering by a lessee. With this precedence it is reasonable to assume that the federal government will have to assume the expense of water developments. Fifty-seven percent of private sector dollars were expended on water development by the 14 Western States in 1991.

* * *

Permitted Use

Removing the term "grazing preference" as specified in the former rules, Taylor Grazing Act, and FLPMA, and adding in its place the term "permitted use" provides unusual latitude for the BLM to redefine authorized livestock use. "Temporary suspended use" and "conservation use" provide the same intent of lower livestock numbers thus isn't the use of these terms redundant? Provisions are available to withdrawal livestock use or provide conservation use under the existing language in FLPMA thus why is there a need to change or eliminate the term "grazing preference"?

* * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, ET AL.,
Plaintiffs/Appellees

v.

BRUCE C. BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,
Defendants/Appellants

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AFFIDAVIT OF FREDERICK W. OBERMILLER

I, Frederick W. Obermiller, do hereby swear on oath as follows:

1. My name is Frederick W. Obermiller.
2. I am over the age of 18 years and make this affidavit based on my personal knowledge.
3. My office is at 232C Ballard Extension Hall, Oregon State University, Corvallis, Oregon 97331. My telephone number is (541) 737-1425.
4. I hold a Ph.D. in Agricultural Economics from the University of Missouri. I was awarded this degree in 1969.
5. I am a full Professor of Agricultural and Resource Economics at Oregon State University. I have been a Professor at Oregon State University since 1974. I teach courses in public land policy, public land law,

agricultural law, and an honors college colloquia entitled "Public Land Law Reform." Before coming to Oregon State, I spent two years as an Assistant Professor at Purdue University.

6. I have produced well over 100 scholarly publications regarding public lands issues. Almost all of these publications concern livestock grazing issues.

7. Commercial cattle ranches are bought and sold on the basis of their livestock carrying capacity, not on acreage. If the carrying capacity of a ranch is reduced, the value of the ranch will suffer a corresponding reduction. Ranch appraisals have historically considered adjudicated animal unit months ("AUMs") including suspended use AUMs as well as active use AUMs. The Tenth Circuit's decision in *Public Lands Council v. Babbitt* ("PLC"), to uphold regulations extinguishing suspended use AUMs and linking permitted livestock numbers to the shifting sands of continuous land use planning, decreases the value of virtually every ranch relying on Bureau of Land Management ("BLM") grazing permits.

8. Although livestock operations have seldom been permitted to utilize all of their adjudicated AUMs, the adjudication of maximum AUMs ("Preference") provided a stable baseline from which to measure management changes in permitted grazing. Since the 1995 regulations do away with this baseline Preference adjudication and with the requirement that grazing levels not be reduced without good cause, ranchers' and lenders' business confidence in BLM permits is likely to be substantially reduced, and the western livestock industry will undoubtedly be destabilized if these regulations are upheld.

9. Ranches will BLM grazing permits attached have aggregate value of between $8,000,000,000 and $10,000,000,000 dollars. The permits themselves have

an aggregate value of approximately $1,000,000,000. Based on these statistics, it is reasonable to suggest that weakening business confidence in BLM grazing permits will result in approximately $1,000,000,000 in losses to the livestock industry, if the permits themselves are rendered valueless due to markedly increased tenure insecurity.

10. Given that many overhead costs of operating a ranch are constant regardless of the number of cattle, the average cost of production increases as herd size decreases. Based on the Tenth Circuit's decision in *PLC*, herd sizes are likely to decrease. Since the average BLM dependent ranch runs approximately 350 to 400 cows, I doubt most ranches could not sustain a reduction of more than 35 head in carrying capacity. Many BLM dependent ranches are already approaching the threshold where costs of production exceed income. For these reasons, a very marginal decrease in AUMs would be sufficient to cause a substantial portion of BLM dependent ranches to be destabilized.

11. 75 percent of commercial size ranching operations in eastern Oregon are BLM dependent. Oregon is typical of the other western states in this respect.

12. Rancher investment in range improvements on BLM land has been consistently decreasing in recent years due to increasing uncertainty in livestock tenure on BLM lands and because of the convergence of livestock price and cost of production.

13. The 1995 rule prospectively vesting title to all future range improvements in the federal government, will eliminate the desire of rational ranchers to invest in range improvements.

14. This rule will also make it impossible to secure financing for such improvements, since such

improvements no longer have any collateral value. For these reasons range improvements are likely to deteriorate and will not be replaced when they are fully obsolete. These consequences would result in poorer range conditions on the public lands and will further decrease the monetary value of BLM dependent ranching operations. FURTHER AFFIANT SAYETH NAUGHT.

/s/ Frederick W. Obermiller
Frederick W. Obermiller

STATE OF Oregon)
)ss.
COUNTY OF Benton)

The foregoing instrument was acknowledged before me this 28th day of October, 1998 by Frederick W. Obermiller.

Witness my hand and official seal.

/s/ Louise E. Barker
Notary Public

My Commission Expires: 4/30/02

[SEAL]

OFFICIAL SEAL
LOUISE E BARKER
NOTARY PUBLIC - OREGON
COMMISSION NO. A309034
MY COMMISSION EXPIRES
APRIL 30, 2002

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, ET AL.,

Plaintiffs/Appellees

v.

BRUCE C. BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,

Defendants/Appellants

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AFFIDAVIT OF JOHN FOWLER

I, John Fowler, do hereby swear on oath as follows:

1. My name is John Fowler.

2. I am over the age of 18 years and make this affidavit based on my personal knowledge.

3. My Address is: Department of Agricultural Economics, New Mexico State University, Box 30003, MSC 3169, Las Cruces, New Mexico 88003. My telephone number is (505) 646-2841.

4. I hold a Ph.D in Agricultural Economics from Iowa State University. I was awarded this degree in 1979. A more complete statement of my professional credentials and published works is appended to this affidavit.

5. I have been a full Professor of Agricultural Economics at New Mexico State University for Approximately 12 years.

6. I currently serve on a team commissioned by the Lieutenant Governor of New Mexico to prepare a portion of a Environmental Impact Statement ("EIS") as a joint lead agency with the federal Bureau of Land Management ("BLM"). A copy of relevant portions of the EIS is appended to this affidavit. This team's portion of the EIS concerns economic, social, and cultural impacts associated with implementation of standards and guidelines for the management of BLM land. The EIS analyzed alternatives generated from: (a) the 1995 range reform regulations; (b) The New Mexico Resources Advisory Council ("RAC") proposal; (c) the Arizona and New Mexico Coalition of Counties for Stable Economic Growth; and (d) taking no action whatever.

7. The "fall back" proposal, based on the 1995 regulations, considers only the health of the physical environment but does not consider impact to humans.

8. The RAC proposal considers the impact of range policy to humans, but gives the physical environment priority over human needs.

9. The Coalition of Counties proposal considers human needs and ecosystem health to be equally important considerations, and proposes livestock reductions in the interest of range health only when there is no other reasonable alternative.

10. New Mexico is a water-based state, meaning that almost all of the BLM grazing permits in the state are based on water rights rather than on land ownership. The 1995 rule eliminating historic preference rights from the BLM grazing system will erase the tie between the grazing permit and its water base.

Historically, BLM grazing preferences provided the means for livestock operators to utilize their water rights and were therefore intrinsically tied to such water rights. In New Mexico, BLM grazing permit is virtually worthless without water rights, and water rights are virtually useless without a BLM grazing permit.

11. If the connection between water rights and BLM grazing permits is severed, and the continuity of the grazing permit is interrupted, agricultural lenders can capitalize the value of the permit only for the term of the permit. Before the 1995 permitted use rule, grazing preferences were considered by lenders to be indefinitely continuing rights with much higher collateral value than temporary use permits. As a result, lenders have drastically reduced the number and size of their loans to BLM dependent livestock operations.

12. Because of the 1995 permitted use rule and the resulting lack of security of tenure in grazing permits, the majority of agricultural lenders in New Mexico will no longer accept BLM permits as collateral for loans.

13. In 1982, BLM grazing permits were worth approximately $1,600 per animal unit. Today, such permits are worth approximately $800 per animal. This dramatic devaluation is a result of uncertainty regarding the security of tenure in BLM grazing arrangements. The 1995 permitted use rule increased this uncertainty substantially.

14. Investments in improvements on public lands require a significant period of time to pay for themselves. Permittees must, therefore, feel secure in their long-term tenure before they will commit financial resources to making improvements. During public debate over the 1995 permitted use rule,

uncertainty regarding permittee tenure in grazing arrangement was heightened and remains high because of the elimination of the historic preferences. As a result, BLM permittees have stopped making improvements on public lands.

15. The 1995 regulation prospectively vesting title to all future range improvements in the federal government has further removed the incentive of permittees to invest in range improvements. In 1986, using a similar rule, the State of New Mexico took title to all future livestock water developments on state lands. Since that rule was adopted, livestock permittees have literally made no livestock water improvements. I predict that the 1995 range improvement rule will have a similarly dramatic result throughout BLM lands.

16. The BLM simply does not have the financial or manpower resources to construct all of the improvements necessary for the protection and enhancement of range resources. I therefore predict that the 1995 regulations, with their built-in disincentives for grazing private investment in range improvements, will result in serious damage to the environment.

17. The historic rate of return on invested capital in New Mexico livestock operations is between one and two percent. New Mexico is reasonably typical of the other western states in this respect. This small profit margin illustrates that livestock operations are highly vulnerable to policy changes, and do not have a great tolerance for increased costs or decreased income resulting from public policy changes.

18. Historically, livestock producers attempt to remain in business to preserve their culture and way of life, even though their assets could generate more income and provide greater security in other investments.

FURTHER AFFIANT SAYETH NAUGHT

/s/ John Fowler
John Fowler

STATE OF New Mexico)
)ss.
COUNTY OF Dona Ana)

The foregoing instrument was acknowledged before me this 22 day of June, 1999 by John Fowler.

Witness my hand and official seal.

/s/ Elizabeth A. Crabb
Notary Public

My Commission Expires: February 3, 2003

BIOGRAPHICAL SKETCH

Dr. John M. Fowler

PROFESSIONAL TITLE	Coordinator-Range Improvement Task Force Professor Agricultural Economics and Agricultural Business
ADDRESS	Department of Agricultural Economics New Mexico State University Box 30003, MSC 3169 Las Cruces, NM 88003 (505) 646-2841 – Business (505) 646-3808 – Fax (505) 524-2482 – Home

EDUCATIONAL BACKGROUND

B.S. Forestry, Iowa State University, 1972
M.S. Agricultural Economics, New Mexico State University, 1974
Ph.D. Agricultural Economics, Iowa State University, 1979
– Range and Forestry Economics

HONORARIES AND PROFESSIONAL SOCIETIES

Society for Range Management
Western Agricultural Economics Association
Society of American Foresters
Fabian Garcia Founders Award of Excellence, NMSU Agricultural College, 1987
Distinguished Service, U.S. Forest Service, Region #3, 1989
Academic Advisor to Public Lands Council of National Cattleman's Association, Distinguished Service, U.S. Forest Service, Region 3, 1992
NMSU Board of Regents, Outstanding Service Award, 1996
Farm Bureau Distinguished Service Award, 1996

EXPERIENCE

Inter regional Fire Suppressionist-USFS, 1970-71
Management Trainee, Timber and Range Management, USFS, Washington Office – Summer Experience, 1972-73
Teaching Assistant, New Mexico State University, 1974-76

Research Assistant, Iowa State University, 1974-76
Research Associate, Iowa State University, 1976-79
Assistant Professor, New Mexico State University, 1979-83
Associate Professor, New Mexico State University, 1983-86
Professor, New Mexico State University, 1986-present
Agricultural Economist, Range Improvement Task Force, 1979-86
Coordinator, Range Improvement Task Force, 1986-present

RELEVANT ACTIVITIES

Expert Witness on State and Federal Grazing Fees:

- Invited statement at Senator Dominici U.S. Senate Subcommittee of Parks, Recreation and Renewable Resource Hearings, 1991
- Invited statement at Senator Schmidt U.S. Senate Appropriations Subcommittee Hearings, 1989
- Invited statement at Congressional Hearing before Subcommittee on National Parks and Public Lands, 1989 and 1990
- Presentation to Senate Grazing Fee Hearings, August 1992.
- Presentation to Public Forum in Economics of Ranching, Jan. 1994

- Statement to Senate Energy and National Resources Committee, May 14, 1994
- Statement to the Senate Forests and Public Land Management Subcommittee of the Senate Energy and National Resources Committee, June 22, 1995
- Statement to U.S. House of Representatives, National Parks, Forests, and Lands Subcommittee of the committee on Resources, July 11, 1995
- Statement to U.S. House of Representatives, Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry, September 17, 1997

CONSULTING EXPERIENCE
1985-1996

Year	Employer	Responsibility
1994-96	Corralitos Venture Ranches	Easement Valuation
1994	Martin Koldyke	Charles R Ranch, Las Vegas, Operational Opportunities
1993	Navajo Board of Supervisors	Equitable Lease Arrangements
1993	Arizona Cattleman's Assoc.	Leasehold Valuations & Analysis
1992	Navajo/Hopi	Range Renovation Costs

1991	Livingston & Associates	N.M. Ranch Valuation & Income
1990	Craig S. Barnes	Arizona Allotment Management Development of Ranch
1990	Frontenac Company	Management Profit Plan
1988-89	Federal Deposit Insurance Corp. (Kemp, Smith, Duncan, Hammond)	N.M. Ranch Valuation of Midland Bank Asset
1988	Jones, Snead, Wertheim, Wentworth (for Bill Sanders)	Obtain easement through State Land Office
1988	Shafie Hindie, Inc	Easement Valuation and Ranch Impact Analysis
1987-88	Jones Firm (w/J.C. Heimann)	Impact Analysis of Oil & Gas Development on Ranch Profitability
1987	American Farm Bureau Federation	Analysis of Federal Grazing Fees in Public Rangelands Improvement Act
1987	Hinkle Law Fimm [sic]	Ranch Valuation for White Sands Missile Range
1986	Howard McDonald	Range Improvement Valuation, White Sands
1986	Benally & Associates	Jemez Recreational Plan Development

1986	South Research & Development	Ute Mountain, Ute & Southern Mountain Ute Recreational Plan Development
1985-86	Soil Conservation Service (Jim Maetzold)	Analysis of Resource Conservation Act and Development of Ecosystem Ranch Budgets

Selected Research Publications

Fowler, John M., D. Rush, J. Hawkes, "Economic Characteristics of the Western Livestock Industry," Range Improvement Task Force Report #35, New Mexico State University AES/CES, 1995.

Fowler, John M., L.A. Torell, and G. Gallacher, "Competitive Pricing for the McGregor Range: Implications for Federal Grazing Fees," *Journal of Range Management*, 47:155-158, March 1994.

Fowler, John M., "The Art and Science of Being an Effective Expert Witness on Natural Resource Issues," *Rangelands*, Vol. 12, No. 4, August 1990.

Fowler, John M. and J.R. Gray, "Rangeland Economics in the Arid West," Chapter 6 in *Rangelands*, University of New Mexico Press, 1988.

Fowler, John M. Grazing Fees and Public Rangeland Management. Hearing before Subcommittee on National Parks and Public Lands of the Committee on Interior and Insular Affairs. House of Representatives, 100th Congress, Washington, DC. Serial #100-18, pp. 192-217.

Fowler, John M. and L.A. Torell, Economic Conditions Influencing Ranch Profitability," *Rangelands*, Vol. 9, No. 2, April 1987.

Fowler, John M. and J. Witte, "Growth Characteristics and Thinning Response for P-J Woodland Type in New Mexico," Proceedings of Pinyon-Juniper Conference, USDA-Forest Service General Technical Report INT-215, January 1987, pp. 266-272.

Workman, J.P. and J.M. Fowler, "Optimum Stocking Rate – Biology vs. Economics," Proceedings of Second International Rangeland Congress, Australian Academy of Science, 1986, 634p.

Fowler, John M. M. Blake, and L.A. Torell, Heterogeneity of Data: Implications for a Variable Federal Grazing Fee," *Journal of Range Management*, 39(3), May 1986.

Fowler, John M. and J.M. Witte, "Oil and Gas Activity on Ranch Operations and Rangelands," *Rangelands*, 7(1):35-37.

Torell, L. Allen and J.M. Fowler, "The Impact of Public Land Grazing Fees on New Mexico Ranch Values," *Journal of the American Society of Farm Managers and Rural Appraisers, Vol.* 50, No. 2, October 1986.

Fowler, John M., J. Witte, and J. Schickedanz, "Oil and Gas Interactions with the Ranching Industry in New Mexico," New Mexico State University, Agric. Exp. Sta. Bulletin #715, February 1985, 32p.

Fowler, John M. L.A. Torell, J.M. Witte, and R.D. Bowe, "Private Land Grazing Transactions in New Mexico 1983-84, Implications for State Trust Lands Grazing Fees," New Mexico State University, Agric. Exp. Sta. and Coop. Ext. Service, Range Improvement Task Force Report #18, March 1985, 44p.

Torell, L. Allen and J.M. Fowler, "Market Values of Ranchers and Grazing Permits in New Mexico, 1984," Agric. Exp. Sta. Research Report 570, June 1985, 10p.

Fowler, John M., B. Peacock, and M. Schaber, "Pinyon-Juniper Woodland Type in New Mexico: Asset or Liability," New Mexico State University, Agric. Exp. Sta. Bulletin 18, October 1985, 67p.

The Bureau of Land Management, United States Department of the Interior, New Mexico Standard for Public Rangeland, Health and Guidelines for Livestock Grazing Management: Draft Statewide Resources Management Plan Amendment/Environmental Impact Statement, 1999

* * *

ECONOMIC CONDITIONS

This section describes the current economic situation of the State of New Mexico. As a part of the entire New Mexico economy; the range livestock sectors are a very minor portion; however, when New Mexico is considered as a group of economics (counties), the number of agricultural economies are greater than the number of urban economies. The total level of economic output for New Mexico is approximately $60 billion, including the $18 billion household sector. The impact from changes to the range livestock industry will be negligible to the urban economies, but highly imposing to the rural counties with large acreage of BLM land.

* * *

Financial, Social and Cultural Conditions

Financial

Financial Conditions for a Properly Functioning Rangelands:

Allen and Hokstra, (1994) state that " . . . a stable and adequate economic base is a requirement for sustainability" (for reaching a properly functioning healthy rangeland condition). As a business, the public land

rancher looks at the net return on his/her investment, according to resource economist John Nalivka, (1993):

The net return to the rancher is the result of combining all of the resources (feed, water, capital, and management) and because it results in an economic return to the rancher, his long term incentive is to enhance the total productivity of these resources and use them more effectively. The management of these resources in an environment of risk and uncertainty to produce a marketable product at a competitive cost is the essence of determining the value of the ranch. In other words, the economic condition of the business which is dependent upon scientific condition and sustained yield of the renewable grazing resource determines the economic value of the ranch. The economic well-being of each ranch subsequently contributes to the economic health of the industry and the industry contributes to the economy of the county, state and Western U.S. as a whole. A secure and optimal balance of forage, water, market access, and capital access is the key to the long term viability of any operation more specifically, the public land rancher, whether the major consideration of range livestock operations and their ability to manage risk and maintain economic viability is access to and the ability to utilize a forage base, which is well balanced with regard to availability, quality, and seasonal use.

In short, as the range improves in productivity with the help of the rancher, the rancher should re-establish his or her profitability and pay the variable costs. Once the profitability is achieved, the rancher will invest capital to improve the healthy ranges. The improved healthy ranges will provide a more secure environment for family and

community stability. With improved security and stability, the rancher will have greater incentive to further invest in public land improvements.

John Fowler states that historically "federal land policies have encouraged development and investment by the grazing permittee. The TGA provided enhanced stewardship, financially stable communities and livestock industry" (Fowler, 1994). The key TGA policy is the Grazing Preference, which was adjudicated to provide security of tenure to encourage investment and commitment on the part of the rancher. In return, TGA states that "Grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the land".

* * *

In 1934, the U.S. Congress enacted the Taylor Grazing Act which provides for grazing leases and permits:

> . . . permits to graze livestock . . . to such bona fide settlers, residents, and other stock owners . . . Preference shall be given in the issuance of grazing permits to those within or near a [grazing] district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights. The Taylor Grazing Act goes on to state, PROVIDED FURTHER. That nothing in the Act shall be construed or administered in any way to diminish or impair any right to possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the

> public lands or which way [sic] be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands".

The intent of Congress was to provide stockholders with " . . . some type of assurance as to where and what kind of range they may have and depend upon in the way of pasturage" (78 Congressional Record). The grazing privileges were subsequently adjudicated to determine who was eligible for a grazing preference. The term "grazing preference" represents a preference for a grazing permit. The grazing preference was attached to the base property of the ranch and was transferred to the party who owned or controlled the base property. The completion of the adjudication process provided predictability and security of tenure to livestock operators. This predictability and certainty in grazing permits provides the security to obtain financing for livestock capital, operations and improvements on the public land.

The Secretary of the Interior has the authority to regulate the grazing to protect the rangeland. Good range management and proper stewardship of the rangeland is ultimately linked to the security and tenure of the adjudicated preference grazing permit/lease, as expressed and demonstrated by a variety of public land research economists (Martin, 1981, Kelso, 1983, Archer, and Snider, 1984). When predictability and certainty are

removed, not only do the ranch finances and family suffer, but the incentive for good stewardship and investment into healthy rangeland improvements is thwarted. The existence of rural families and communities continues to depend foremost on the availability of land for livestock, crops, timber, and other resources. Land is the life and well-being of the rural culture in New Mexico. Working the land is the center piece of their livelihood; supported by multiple sources of supplemental income from wages and jobs in town. The land and water based cultures of New Mexico depend on use of natural resources that are derived from land and water. Such uses include ranching, farming, mining, and timber harvesting which leads to sustainability of these communities. These customs include long term use, land ethics and stewardship of the land by individuals and communities. Slowly these communities are changing due to influences outside the community. Televisions, new restrictions on the consumptive use of resources on the public lands, computers, immigration, and out-migration are all examples of influences that are modifying the unique character of the communities. In spite of the modifying influences to their communities, many communities do not have a program to maintain custom and culture on a sustainable manner.

Customs & Cultures of Counties

The counties, Indian tribes and pueblos of New Mexico were asked to define their customs and cultures in their own terms. Their statements have been included in Appendix E.

The customs and cultures of rural New Mexico are outgrowths of the people's values, beliefs, and ways of life, combined with all other aspects of living, which weave a complex whole. These customs and cultures are practiced within a relationship between people and *place*.

Place is the site or sites marking the life of a person the story of their life and that of the lives that came before them. All of these attributes are embodied in the structures they call home, the communities they live near or within, and the environment.

The customary uses of the lands continue to be for croplands, grazing, timber and mining that support rural communities and are [sic] contribute to the overall state's economy. The commitment to the land they live and work on is so powerful as to evoke words like: "I don't want to be here [alive], if I can't live here [this person's ranch]." It should be clear then that *place* and identity are virtually inseparable. This is especially true of rural New Mexico where people often cannot, will not, separate themselves from the land they call home (Smith, 1994). Such a separation would destroy the very identity of those people.

The customs and cultures that rural New Mexicans practice on their landscape is inclusive of their home and family and the community they consider themselves a part of. It is a bond between people and *place* that is no less than the bond between flesh and blood; it is wholly dependent upon the fabric of land, people, and community being intact and stable.

The importance of community stability is expressed in the statements of custom and culture form the counties.

An example of a commonly held feeling on the community is 1: "will pass along many of the beliefs and values that are cherished by our rural society . . . " It is within *place* that the values of a region are cultivated. For the people of rural New Mexico, values are products of their history and their experiences with the land that are essential to the continuation of their way of life. These values include the "meaning of heroism, the relation of the individual to family and community, the nature of patriotism, the value of freedom, the challenge of making a home" (Cronon 1992).

Concept of Public Land Usage

The core values of the people of rural New Mexico form the basis of their concept of their use on the public lands – lands that are so crucial to the security and stability of their rural way of live.

* * *

Range improvements are long term investments in the basic land resource that require years to yield a positive return to amortize the dollars invested.

* * *

Methodology

With the identification of ranches affected by region, as shown in Figure 4-2 and an average budge for each ranch size within each region, impacts to the ranches needed to be identified. This was done with the help of industry representatives and the BLM. The BLM and ranchers cooperatively identified the improvements that were

most probable for an allotment in each region to achieve the standard. With this information the industry representatives estimated, as a percentage, the increased variable costs that would be associated with the improvements recommended. These percentages were then applied to the average budget for that particular region and ranch size. At this point there were two options applied to the analysis for all three alternatives:

1. That all of the allotments not meeting the standard could be improved without a reduction in AUMs. Ranches would attempt to feed their way out of the forage deficiency and that the allotment would improve.

2. That some of the allotments would require the removal of AUMs for that allotment to improve and meet the standard. For this option all allotments, not meeting the standard, were analyzed with the removal of 20% of the authorized AUMs.

It should be recognized that both are unlikely and that the real impact would be some point between the two options. After implementing these two options into the analysis, three additional options for the previous 2 options for each alternative, were analyzed for each region, ranch size, and AUM reduction, they were:

1. That the BLM would provide all of the funding for the establishment of the improvements to bring the allotment to standard.

2. That the BLM would provide the funding for the materials and the ranch would provide the labor of constructing the improvement.

3. That the ranch would provide all of the funding for the establishment of the improvements to bring the allotment to standard.

These three options were considered because of the limited funding available to the BLM for range improvements. Neither of the options are likely; but, some combination of all three is most probable to happen.

Another possibility considered in the analysis was that with increased regulation and operating costs to the ranch, some of the ranches would sell the base property for development and no longer use the federal permit. For additional analysis it was assumed that 22%[1] of the ranches not meeting the standard would convert to real estate rather than shoulder the cost of additional improvements and regulation. These ranches, including the permit/lease, were assumed as permanent losses and no longer maintained in production. Although it is possible that the federal permits/leases may be purchased by another ranch, it was not considered in this analysis due to the insecure tenure of federal permits. When 22% of the impacted ranches not meeting the standard were removed, the same assumptions that applied to the scenario that no ranches quit were applied to the remaining 78% of these ranches.

* * *

[1] Percent of ranches identified in "Economic Characteristics of the Western Livestock Industry" as ranches in New Mexico that would convert to real estate with the loss of federal AUMs.

Cultural

This alternative could have adverse impacts on ranches with public lands not meeting the standard. Most public land ranches in New Mexico are family run businesses. The effect of one person losing his or her connection to the land ripples throughout the communities. The communities of the arid southwest are made up of people who share beliefs and values which are, if not embodied by, closely linked to the culture of ranching. As the individuals who ranch their lands because of increased economic pressures and/or the demand for changing uses, the values of the communities as a whole begin to unravel in the descent toward a less centered, less self-reliant, and more homogenous monoculture.

The financial and social impacts could have adverse effects on ranch traditions, heritage, attitudes, beliefs and values. The culture of ranching depends on the interaction of the ranchers lives with the land and livestock. Any one of these components taken away dismantles the entire weave. To protect the irreplaceable cultures, the weave of people and land must remain intact in those traditional forms of interaction. Cultural values of self sufficiency, hard work, and other traits, such as community cohesion, collaboration and leadership associated with agrarian communities, could be altered. As discussed in chapter three, the sense of place with its association with a sense of well-being and community stability would be further eroded for some of the ranching communities.

* * *

The Range Reform '94 Draft EIS briefly raised the potential effects on rural communities:

> Generally, small isolated communities are more vulnerable . . . due to weaker links to centers of political and economic influence . . . these smaller communities are more likely to experience unemployment, increased poverty, and social disruption in the face of policy shifts in management policy.

When ranchers go out of business, sell base property for housing development, and are not replaced, the loss of social mobility, erosion of the agrarian way of life, and out-migration would lead to reduced family spending and secondary effects on businesses, infrastructure and services (schools, medical care, emergency services, environmental services, etc.).

Cultural

This alternative could have adverse impacts on ranches with public lands not meeting the standard. Most public land ranches in New Mexico are family run businesses. The effect of one person losing his or her connection to the land ripples throughout the communities. The communities of the arid southwest are made up of people who share beliefs and values which are, if not embodied by, closely linked to the culture of ranching. As the individuals who ranch leave their lands because of increased economic pressures and/or the demand for changing uses, the values of the communities as a whole begin to

unravel in the descent toward a less centered, less self-reliant, and more homogenous monoculture.

The financial and social impacts could have adverse effects on ranch traditions, heritage, attitudes, beliefs and values. The culture of ranching depends on the interaction of the ranchers lives with the land and livestock. Any one of these components taken away dismantles the entire weave. To protect the irreplaceable cultures, the weave of people and land must remain intact in those traditional forms of interaction. Cultural values of self sufficiency, hard work, and other traits, such as community cohesion, collaboration and leadership associated with agrarian communities, could be altered. As discussed in chapter three, the sense of place with its association with a sense of well-being and community stability would be further eroded for some of the ranching communities.

* * *

UNITED STATES SUPREME COURT

No. ___

PUBLIC LANDS COUNCIL, ET AL.,
Petitioners

v.

BRUCE C. BABBITT, SECRETARY OF THE INTERIOR, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AFFIDAVIT OF JACK C. McCALL

I, Jack C. McCall, do hereby swear on oath as follows:

1. My name is Jack C. McCall.

2. I am over the age of 18 years and make this affidavit based on my personal knowledge.

3. My Address is: P.O. Box 1598, Twin Falls, Idaho 83303.

4. I am the owner of Clear Creek Land and Mortgage, in Twin Falls, Idaho. My company operates in Idaho, Utah, Nevada, Wyoming and Montana. I am almost exclusively engaged in the business of agricultural lending. A more complete statement of my professional credentials and experience is appended to this affidavit.

5. The 1995 regulation replacing the grazing preference with "permitted use" ("Permitted Use Rule") deprives Bureau of Land Management ("BLM") grazing permit holders of the right to activate their suspended animal unit months ("AUMs") when increasing forage becomes available. the Permitted Use Rule also bases BLM allotment stocking rates on land use planning rather than on predictable preference limits, reduced as necessary to protect the range.

6. Because suspended use AUMs may no longer be activated by the BLM permit holder, they no longer add any value to the ranching operation. Furthermore, the fact that BLM allotment stocking rates are based on the ever-changing land use planning process has resulted in substantial tenure insecurity for the permit holder.

7. A *secure* BLM permit enhances the value of a ranching operation by increasing the total livestock carrying capacity of the business. The Permitted Use Rule has significantly harmed the security of tenure and has caused a loss of ranch property values for purposes of sale or as collateral for loans. This loss of value has drastically reduced the availability of loan capital for BLM dependant ranching operations and is forcing many of these operations into insolvency and out of business.

8. Approximately fifty percent of the agricultural lenders in Idaho and elsewhere in the Northwest will no longer make loans to BLM dependant ranching operations because of tenure insecurity occasioned by the Permitted Use Rule. The remaining fifty percent that continue to make loans to BLM dependant operations will only do so where the ranch has sufficient private land to sustain its operation without the BLM permit.

9. My firm has approximately $25,000,000 currently at risk in loans to BLM dependant ranching operations. This figure accounts for approximately twelve to fifteen percent of my firm's investment in loans. If I were forced to write off these loans, underwriters would lose confidence in my firm and the firm would lose the access to capital that it currently enjoys. The combined financial loss and loss of access to capital would immediately force my firm out of business. The Permitted Use Rule has placed the financial solvency of my firm, and of agricultural lenders in general, in serious jeopardy.

10. Because the Permitted Use Rule has decreased the tenure security of BLM permit holders, most permit holders are no longer willing to make long-term investments of private funds in range improvement projects which benefit wildlife and serve other important conservation purposes. Because the Permitted Use Rule removes the promise that the permit holder can recover suspended use AUMs when the range improves, most permit holders are no longer willing to expend significant private resources to improve the range. The permitted use rule actually discourages responsible range management and encourages short-term profiteering and abuse of the public range.

11. The rule vesting title to all future range improvements in the United States ("Range Improvements Rule") has deprived lenders of potential collateral interests in range improvements. Furthermore, it is easier for the BLM to remove permit holders from the public range if the permit holders do not hold title to permanent fixtures on the range. The Range Improvements Rule, therefore, substantially decreases the tenure security of BLM permit holders.

12. Because of tenure insecurity resulting from the Permitted Use Rule and the Range Improvements Rule, and because the Range Improvements Rule prevents lenders from gaining collateral interests in range improvements, most financial services organizations will no longer loan money for the construction of range improvements on public land. The inability to secure private funding for range improvements will cause pervasive ecological damage on the public ranges.

13. Because many portions of public land are fenced in and managed indistinguishably with private land, forcing the private rancher off the public land would also require the building of fences around private lands that are intermingled with BLM lands. In many cases, these fences will not make ecological sense and will disrupt wildlife and recreationists.

14. Similarly, if the BLM dependent ranchers are forced to give up ranching because their grazing permits are no longer sufficient, many of them will have no alternative but to sell their private lands, which are intermingled with the public lands, to real estate developers for the construction of recreation cabins or condominiums. Such construction projects would deter wildlife from inhabiting the public lands and disrupt the scenic quality and other conservation values of the public lands.

15. Many BLM dependent ranchers have already made improvements which transport water from their own private lands to public lands for purposes of watering their livestock. If these improvements must be rebuilt, or if the owners of these improvements are no longer able to continue their livestock operations, they will almost certainly remove their improvements and thereby deny the use of their private

water resources to wildlife and other conservation purposes on the public lands.

16. The instability to the livestock industry caused by the Range Improvements Rule and Permitted Use Rule threatens the livelihood and way of life of many families in many states throughout the West. Many of the affected families have been engaged in the livestock business for several generations and would be deeply harmed if they were forced to give it up.

17. The instability to the livestock industry caused by the Range Improvements Rule and Permitted Use Rule also threatens the culture and unique way of life of many rural communities throughout the West.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Jack C. McCall
Jack C. McCall

STATE OF Idaho)
) ss.
COUNTY OF Twin Falls)

The foregoing instrument was acknowledged before me this 16th day of June, 1999 by Jack C. McCall.

Witness my hand and official seal.

/s/ Lynn Gadsby
Notary Public

[seal]

My Commission Expires: 3/24/2003

Clear Creek Land & Mortgage

JACK C. McCALL, ARA
Retired

PRESENT AFFILIATIONS:

Partner – *CLEAR CREEK LAND & MORTGAGE*
Farm & Ranch Loan Correspondents

Owner – *CLEAR CREEK PROPERTIES, INC.*
Farm, Ranch and Land Brokers, Managers and Consultants

Owner – *CLEAR CREEK FARMS*
Irrigated Agricultural Lands and Beef Cattle Operation

PAST AFFILIATIONS AND EXPERIENCE:

Private Appraising – 20 years

Appraised properties in Idaho, Oregon, Utah, Colorado, Wyoming, Montana and Nevada for insurance companies, banks, attorneys and numerous business enterprises and individuals. Appraisals have been for various purposes including real estate loans, estate settlements, guide for sale purposes, etc. Specialize in farm, ranch, and commercial agri-business properties.

Court appointed receiver on various properties

Field Appraiser, The Traveler's Insurance Company – 6½ years in Idaho, Nevada and Utah.

Loan Correspondent for Metropolitan Life Insurance Co., The Mony Group, and Zions Agricultural Finance.

EDUCATION:

Graduate of ***Oregon State University,*** Corvallis, Oregon – Bachelor of Science Degree in Agricultural Economics – Minor in Range Management.

Completed Rural Appraisal School of the American Society of Farm Managers and Rural Appraisers in 1974.

American Society of Farm Managers & Rural Appraisers

- Report Writing Seminar
- Eminent Domain Seminar

American Institute of Real Estate Appraisers

- Standards of Professional Practice
- Various Seminars and workshops on appraisal problems and techniques including Report Writing, Professional Ethics, Court Testimony & Conduct, etc.

National Association of Realtors

- Numerous courses and seminars in Real Estate Law, Finance, Administration, Ethics, Appraising, Management, etc.

PROFESSIONAL MEMBERSHIPS:

* Alpha Zeta Agricultural Honorary
* Idaho Society of Rural Appraisers and Farm Managers
* American Society of Farm Managers and Rural Appraisers
* Past Farm President – Idaho Society of Rural Appraisers and Farm Managers

* Past Chairman – Magic Valley Society of Rural Appraisers
* Licensed Real Estate Salesman for the State of Idaho
* Board Member of Little Pilgram Irrigation Company

PROFESSIONAL DESIGNATION:

ARA – Accredited Rural Appraiser #538 American Society of Farm Managers and Rural Appraisers

COURT TESTIMONY:

I qualify as an expert witness in matters pertaining to real estate value and management in Probate, District and Federal Courts, in addition to appearing as an expert witness in Bankruptcy Courts, various Tax Appeal Courts and before Legislative Committees.

CURRENT STATUS:

In addition to having the previous experience of servicing various clients, I have also owned office buildings, farmland and subdivision development land myself, as well as being a ranch owner. This has given me a knowledge of the income, expenses and management of property from an owner's standpoint as well as appraisal, mortgage lending, consultation, and management for other property owners.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, ET AL.,

Plaintiffs/Appellees

v.

BRUCE C. BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,

Defendants/Appellants

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AFFIDAVIT OF JACQUELINE A. BUCHANAN

I, Jacqueline A. Buchanan, do hereby swear on oath as follows:

1. My name is Jacqueline A. Buchanan.
2. I am over the age of 18 years and make this affidavit based on my personal knowledge.
3. My office is at 951 Warner Court, Casper, Wyoming 82601-1307. My telephone number is (307) 261-5305.
4. I received a Bachelor of Science degree from Pennsylvania State University in 1988, with a major in Animal Science.
5. Ever since graduating from college approximately 10 years ago, I have worked in agricultural lending.
6. I am currently employed as a Farm Loan Program Specialist at the Casper Wyoming office of the Farm

Service Agency ("FSA"). Prior to taking this position, I was employed as Area Agriculture Credit Manager in the New Mexico office of FSA. I have also worked for FSA in Washington, D.C. and North Carolina.

7. The "Permitted Use Rule," upheld by the Tenth Circuit in *Public Lands Council v. Babbitt* ("PLC") significantly jeopardizes a lender's ability to lend money to livestock operations. Because the Bureau of Land Management ("BLM") no longer uses adjudicated preference rights as a standard for measuring stocking levels, FSA cannot rely on stable future livestock numbers as security for loans, nor to calculate the borrower's ability to service the debt.

8. The new "permitted use" rule has substantially decreased the value of grazing permits as security for loans, and in some cases has rendered such permits completely valueless. Many ranchers rely on federal grazing permits for most of their debt security. In some cases, the permits represent up to 95 percent of the security. Since permitted livestock numbers are no longer founded on a reliable standard, lenders are deprived of most of their security for these loans, and is therefore unwilling to lend as freely as it used to. In New Mexico, I estimate that this problem will seriously affect approximately 40 to 60 percent of FSA's livestock loan portfolios.

9. The inability of many ranchers to obtain sufficient financing for their operations is likely to make a number of them insolvent, and force them out of business. This, in turn, will place their existing loans in default, causing financial losses to lenders.

10. The "range improvements" rule, upheld by the Tenth Circuit in PLC, also decreases the value of BLM grazing permits as security for loans. Since the BLM holds title to all improvements constructed

after July 21, 1995, FSA is unwilling to value those improvements as security for any loan.

11. Lenders are unwilling to loan money for range improvements on federal land, because the improvements can no longer adequately secure such loans. This is regrettable because it impairs the livestock operators' ability to manage their businesses, as well as their capacity to make improvements for the benefit of the range.

12. FSA is fearful that the 1995 "range improvements" rule removes incentives for the BLM to continue grazing. Since livestock permittees are unable to own any interest in their improvements on federal land, and the government has no duty to compensate permittees for such improvements if grazing privileges are suspended or removed. FSA's business confidence in the reliability of grazing permits as security for loans has therefore decreased, and the business of lending to ranchers has been significantly impaired.

13. If the "permitted use" rule and the "range improvements" rule were invalidated, lenders such as FSA would be substantially more confident in lending money to livestock businesses with operations on federal lands. By mentioning these two rules, I express no opinion whatever with respect to the "qualifications rule."

14. My statements herein are based on my experience as an FSA employee. However, because of my involvement with many guaranteed lenders, I am certain that the regulations mentioned herein will have equally serious impacts on other agricultural lenders.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Jacqueline A. Buchanan
Jacquelyne A. Buchanan

STATE OF Wyoming)
)ss.
COUNTY OF Natrona)

The foregoing instrument was acknowledged before me this 26th day of October, 1999 by Jacquelyne A. Buchanan.

Witness my hand and official seal.

/s/ Julie L. Caves
Notary Public

JULIE L. CAVES NOTARY PUBLIC

[SEAL]

County Of Converse — State Of Wyoming

My Commission Expires
Mar. 19, 2000

My Commission Expires: 3-19-2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, ET AL.,
Plaintiffs/Appellees

v.

BRUCE C. BABBITT,
SECRETARY OF THE INTERIOR, ET AL.,
Defendants/Appellants

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AFFIDAVIT OF JIMMIE C. HALL

I, Jimmie C. Hall, do hereby swear on oath as follows:

1. My name is Jimmie C. Hall.

2. I am over the age of 18 years and make this affidavit based on my personal knowledge.

3. My offices may be reached at P.O. Box 3915 Carlisle, New Mexico 87109 or P.O. Box 3694 Albuquerque, New Mexico 87190. My telephone number is (800) 722-4679.

4. I am President and CEO of Production Credit Association of New Mexico ("PCANM"). I have served in this capacity for approximately ten years. PCANM is primarily engaged in lending to livestock producers.

5. Calf production is significantly more expensive for public lands ranchers than for purely private operations. Weaning weights for calves grazed on public

lands also tend to be lower than for calves grazed on purely private lands.

6 Because of the 1995 Permitted Use Rule, ("PUR") sustained by the Tenth Circuit, PCANM and other agricultural lenders have been forced to reduce lending to public lands dependent ranching operations. Because the PUR does not permit the permit holder to retain suspended use animal unit months ("AUMs"), such suspended use AUMs can no longer be considered security against any loan. Livestock operators may, therefore, only borrow against active use AUMs for the limited duration of their permits. These limitations are serious and substantial reductions in available credit for livestock producers.

7. PCANM is currently studying further reductions in security for future loans because of the PUR.

8. Because of the new BLM rule vesting title to all future range improvements in the federal government, PCANM and most other agricultural lenders are unwilling to make loans for range improvements, since such improvements could no longer be reclaimed as security. Furthermore, since the 1995 Range Improvements Rule ("RIR") was enacted, there have been very few requests for loans to make range improvements. This is, presumably, because ranchers are unlikely to spend time, effort, and money to construct improvements they cannot legally own.

9. The 1995 RIR also makes loans to water-based permittees less secure. Because the government asserts ownership of improvements which are necessary to take advantage of vested water rights, these water rights are less secure than if the improvements belonged to the owner of the water rights. Such water rights and any attached permit are, therefore,

not as valuable for securing a loan as they were before the 1995 RIR was adopted.

10. Many water-based permittees are unable to utilize their water rights without improvements. The 1995 RIR therefore forces such permittees to expend resources building improvements that they cannot own in order to exercise their water rights, conferring unjust enrichment on the government. It is likely that the government will require that such improvements be constructed in a specified way to benefit wildlife and other conservation uses, and which may be more expensive than the permittee might have chosen to build for stock watering purposes. The RIR therefore devalues the permittees' water rights and the grazing permits attached thereto. The above-described decrease in the stability and value of water based permits makes such permits less valuable as security for loans, and will result in loan denials or substantial reductions in the amounts that will be loaned against such permits.

11. The 1995 rule permitting individuals and entities not engaged in the livestock business to obtain grazing permits opens the possibility that conservation groups may acquire such permits. This rule makes such permits less secure as security for loans, because conservation groups could potentially obtain such permits and find a way to place such permits in non-use.

12. The attached documents are studies done by PCANM regarding the predicted effect of increases in livestock permit fees. Although the Tenth Circuit's decisions to uphold the three rules discussed in this affidavit do not involve increases in fees, they can be expected in increased costs of production per animal by bringing about reductions in permitted livestock numbers and devaluing the underlying ranching

operations. These studies are, therefore, helpful in demonstrating the fragility of the western livestock industry and the likely effects of even minor increases in the cost of production.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Jimmie C. Hall
Jimmie C. Hall

STATE OF New Mexico)
)ss.
COUNTY OF Bernalillo)

The foregoing instrument was acknowledged before me this 27th day of October, 1998 by Jimmie C. Hall.

Witness my hand and official seal.

/s/ Kim L. Peters
Notary Public

[SEAL] OFFICIAL SEAL
KIM L. PETERS
Notary Public
State of New Mexico
My Commission Expires 03/01/2000

My Commission Expires: 03/01/2000

INTERNAL ANALYSIS OF THE IMPACT TO ALBUQUERQUE PRODUCTION CREDIT ASSOCIATION'S LOAN PORTFOLIO OF PROPOSED GRAZING FEE INCREASE
AS OF DECEMBER 31, 1992
BY: ASSOCIATION OFFICERS

Albuquerque Production Credit Association (APCA), part of the Farm Credit System, is authorized to make short and intermediate term loans to agricultural producers. APCA, originated in 1934, is chartered to provide agricultural credit in 32 of New Mexico's 33 counties. Historically, APCA's loan portfolio has consisted of cattle and sheep loans. The following study is in response to the proposed federal grazing fees increase by the Clinton administration. President Clinton's budget plan called for an increase in grazing fees from $1.92 to $2.95. Another proposed hike in fees is from $1.92 to $5.36. Under pressure from western state Democratic senators, the Clinton administration has dropped the grazing fee hikes from its proposed budget. *This study looks at the effects of these proposed incremental increases if they were to become law.*

The association's total portfolio was reviewed baised [sic] on the following selection criteria, the borrowers operation being 10% or more dependant [sic] on federal leases (public group) or the operation being less than 10% dependant [sic] on federal leases (private group). Forty borrowers from APCA's loan portfolio of 120 borrowers were randomly selected. All of the 40 borrowers selected are cow/calf operations per the Tenth Farm Credit District Internal Review manual enterprise code definition – 50% or more of income of the operation is derived from the sale of calves.

Borrower Profile (Public Group)

Of the 20 borrowers selected, 3 are members of United States Forest Service (USFS) community grazing allotments. These community grazing allotments are located in the northern half of New Mexico. All of the 20 borrowers live on the ranches and are the primary managers/operators. Of the 20 borrowers, 17 conduct their ranch operations as a sole proprietorship. Two of the 20 borrowers conduct their ranch operations as closely held family corporations. These family members live on the ranch and are involved in the operation as corporate officers. They generally own 100% of the corporate stock. One of the 20 borrowers is a family partnership, with the family as the individual partners and directly involved in the daily operations of the ranch. Five of the public group (25%) are Hispanic and one (5%) is female. Based on outstanding balance and commiiment at 12/31/92, the largest borrower was $369,340, and the smallest borrower was $15,256. Their total outstanding loan balance and commitment at year end was $2,596,065.

While no consideration was given to location in the selection process in the public group, but using Interstate 40 and 25 to divide the state into four quadrants, 3 of the borrowers' operations are in the southeast quadrant, 12 are in the southwest quadrant, 5 are in the northwest quadrant, and no borrowers are in the northeast quadrant. Using Interstate 25 as the east-west dividing line, 17 of the borrowers ranch on the western side of New Mexico, and 3 ranch on the eastern side of New Mexico.

Borrower Profile (Private Group)

Of the 20 borrowers, 15 conduct their ranch operations as a sole proprietorship. Three of the 20 borrowers conduct their ranch operations as closely held family corporations. These family members live on the ranch and are involved in the operation as corporate officers. They generally own 100% of the corporate stock. One of the 20 borrowers is a family partnership, with the family as the individual partners and directly involved in the daily operations of the ranch. One of the 20 borrowers' operations is conducted as a family trust. Two of the private group (10%) are Hispanic and one (5%) is female. Based on outstanding balance and commitment as of 12/31/92, the largest borrower was $1,238,847, and the smallest borrower was $5,207. Their outstanding loan balances and commitments at year end were $4,181,645.

While no consideration was given to location in the selection process in the private group, but using interstate 40 and 25 to divide the state into four quadrants, 12 of the borrower's operations are in the southeast quadrant, 2 are in the southwest quadrant, 2 are in the northwest quadrant, and 4 are in the northeast quadrant. Using Interstate 25 as the east-west dividing line, 4 of the borrowers ranch on the western side of New Mexico, and 16 ranch on the eastern side of New Mexico.

APCA's Credit Quality

APCA's internal review program has been accepted by APCA's regulators, the Farm Credit System and the Farm Credit Bank of Texas. The proposed increase in the grazing fee to $2.95 would result in 7 of the 20 borrowers or

35% being reclassified in a lower category. If the fee was increased to $5.36, four of the 20 borrowers would be reclassified in a lower category. Even though APCA would still be within District Standards, APCA's acceptable loan volume would decrease from 73.21% to 72.44% if the fee was increased to $2.95. If the fee was increased to $5.36 acceptable loan volume would be 75.67%. *While the percent of Acceptable Loan Volume under the proposed $5.36 fee is more after the increase in fee, it should be remembered that 8 borrowers would already be out of business if the fee were increased to $5.36.* Regardless of whether the fee was increased to $2.95 or to $5.36 there would be a steady deterioration in APCA's Credit Quality.

Nonaccrual Loans

With the proposed increase in the grazing fee, APCA's nonaccrual (noninterest bearing loans) loan volume would increase from 4 loans for $622,921 or 5.9% to 6 loans for $924,284 or 9.2% at the $2.95 rate and 9.9% at the $5.36 rate. Two loans currently in OAEM for a total of $301,363 would be put into substandard/nonaccrual for a period of time pending liquidation.

The District Standard for nonaccrual loans is less than 3.00% average investment in noninterest bearing assets as a percent of average accrual loan volume. Nonaccrual loans would not meet district standards.

Allowance for Loan Loss Reserve (ALL)

At 12/31/92 APCA's ALL was $470,723 or 4.5% of APCA's outstanding loan balance of $10,510,216. The

projected grazing fee increase would not result in a loss to APCA in any of the 40 borrowers included in the study. The ALL would not need to be adjusted due to the loss of loan volume.

Association Earning

The projected loss in volume to APCA is based on the best estimate the fee increases would have on the borrower's total annual commitment.

Recognizing that there are many factors that affect APCA's earnings, the borrower spread was chosen to analyze earnings. At 12/31/92, the Association's spread between its cost of funds and the Association's interest rate to borrowers was 3.85%. At the 12/31/92 loan volume of $10,510,216, this 3.85% spread would yield an annual gross income of $404,643. With a fee increase to $2.95 and loan volume of $9,949,325, the annual gross income would be $383,434 or a $21,209 reduction in income. At a $5.36 fee, and loan volume of $9,358,153, annual gross income would be $360,289 or a reduction of $44,354 in income.

The substantial increase in nonaccrual loans would also adversely impact the earnings capacity of APCA as these loans are excluded from APCA's Direct Loan with the FCBT, and high risk accounting guidelines prohibit accruing interest on loans in nonaccrual. These reductions in income would severely jeopardize the viability of APCA.

Average Debt Per Cow

The debt per cow was figured on all forty loans. Comparison were made between the public group and the private group on debt per cow (DPC) before and after the increases in grazing fees. Ranchers dependent on federal grazing show debt per cow an average of $34 higher than those ranchers operating on private, state and deeded land. If the grazing fee increased to $2.95, that average would increase to $41. If the grazing fee increased to $5.36 that average would increase to $59. (Exhibits E, F & G)

DEBT PER COW
Before Increased Fee

Public Group	Private Group
Average Debt Per Cow	*Average Debt Per Cow*
$471	$437

With the Fee Increased to $2.95

Public Group	Private Group
Average Debt Per Cow	*Average Debt Per Cow*
$478	$437

With the Fee Increased to $5.36

Public Group	Private Group
Average Debt Per Cow	*Average Debt Per Cow*
$496	$437

Average Repayment Per Cow

Comparisons were also made between the public group and the private group on repayment per cow (RPC). This comparisons includes the grazing fee increases. The repayment per cow was figured on all forty loans. Repayment per cow in the public group is an average of $46 less than those in the private group. Review of the total forty loans indicate the cattle in the private group weigh more. This indicates federal grazing land is more expensive to run cattle on, and it is not as productive as deeded and privately leased land.

REPAYMENT PER COW

Public Group	Private Group
Average Repayment Per Cow	*Average Repayment Per Cow*
$290	$336

Conclusion

Public Group ($2.95)

At 12/31/92, the total outstanding volume for APCA was $10,510,215 to 120 borrowers. The 20 borrowers selected represent 17% of those 120 borrowers. These 20 borrowers had a combined total outstanding loan balance of $1,888,064 or 18% of APCA's total loan Volume. These 20 borrowers had approved but undrawn loan commitments of $708,001 at 12/31/92. Their total outstanding loan balances and commitments at year-end was $2,596,065. With the grazing fee increased to $2.95, the balance sheet analysis of the 20 loans showed a combined loss of $50,374 in working capital and a combined decrease in net worth of $2,234,587. The projected loss in working

capital is the result of forced liquidation of cattle because the borrower would no longer be able to afford the grazing fee increase. The projected loss inner worth is primarily due to the loss of the grazing permit as an asset. If the grazing fee was increased to $2.95, 3 of the 20 borrowers, or 15%, would be put out of business because of the fee increase regardless of whether the grazing was available. Nine of the 20 borrowers would be put out of business because the fee increase would result in loss of access to grazing. Eight of the 20 borrowers could continue their operation, but at a reduced capacity.

Public Group ($5.36)

With the grazing fee increased to $5.36, the balance sheet analysis of the 20 loans showed a combined loss of $169,166 in working capital and a combined decrease in net worth of $2,234,587. The projected loss in working capital is the result of forced liquidation of cattle because the borrower would no longer be able to afford the grazing fee increase. The projected loss in net worth regardless of whether the fee is increased to $2.95 or to $5.36 is primarily due to the loss of the grazing permit as an asset. If the grazing fee was increased to $5.36, 8 of the 20 borrowers, or 40% would be put out of business because of the fee increase regardless of whether the grazing was available. Five of the 20 borrowers, or 25% would be put out of business if the fee increase resulted in loss of access to grazing. Seven of the 20 borrowers could continue their operation, but at a reduced capacity, and in one case the credit classification would drop.

Private Group

The 20 borrowers selected represent 17% of the APCA's 120 borrowers. These 20 borrowers had a combined total outstanding loan balance of $2,106,376 or 20% of APCA's total loan balance. These 20 borrowers had approved but undrawn loan commitments of $2,075,269 at 12/31/92. Their total outstanding loan balances and commitments at year-end was $4,181,645. These 20 borrowers would not be affected by the increase in grazing fees.

Impact on APCA

Had the proposed grazing fee ($2.95) been implemented prior to year-end 12/31/92, APCA's 12/31/92 loan volume would have been reduced from $10,510,216 to $9,956,325, or a 5.30% decrease. APCA's nonaccrual loans would increase 3.3% to $924,284 or 9.2%. At this level APCA would not meet district standards for nonaccrual loans. At the $2.95 fee, annual gross income would drop to $383,434.

If the $5.36 fee had been implemented, APCA's loan volume would have been reduced to $9,358,153 or 10.96%. APCA's loan volume would have been reduced to $9,358,153 or 10.96%. APCA's nonaccrual loans would increase to 9.90% and fall below the district standards. APCA's gross income would be reduced to $360,289. The projected reduction in APCA loan volume is due to lower loan commitments as less funds would be needed to purchase cattle and/or operating expenses.

A fee increase limited to $2.95 may pose only a minimum threat to APCA's viability. An increase to $5.36 would seriously jeopardize APCA's viability.

Western Commerce Bank

October 29, 1998

Connie Brooks, Esquire
C.E. Brooks & Associates, P.C.
Suite 1010 Denver Center
1776 Lincoln Street
Denver, CO 80203

Dear Ms. Brooks:

Western Commerce Bank (WCB) has been financing farmers and ranchers for thirty-five (35) years in southeastern New Mexico. We are, in fact, the largest agricultural lender in this area of the state. Our policy has evolved on Federal land ranches over the past several years from one of a secured lender to more of a risk management lender.

By direct review of standard practice and procedures to perfect lien positions when making loans to borrowers with public land operations, the banking industry and Regulators, including the State of New Mexico and FDIC, have clearly recognized a "grazing preference" in its determination of security for ranch loans in the past. In addition, removal of range improvements as well as "grazing preference" will adversely effect the net worth of every public ranching borrower currently on the books.

"Grazing preference" is a term referring to the legally permitted number and class of livestock assigned to a specific Grazing Permit. As a permit legally tied to a piece of property, it is a legal requirement of the loan that it be recorded in the security agreement as collateral. The assurance that a permit will not change from one year to

the next is a necessary constant to both the borrower and the bank. Since the basis of a ranch operation loan is to gain revenue from the production of livestock, numbers are essential factors in determining feasibility of the operation. Without long term financing these livestock operations cannot continue. The many variables affecting profitibility [sic] in the short-term can be compensated for in the long term if there is reasonable security interest shown. Agriculture has always been a high risk venture if the only consideration is short term analysis. Its stability and profitability are only realized in long term studies. Without assurance that permits will remain intact within a specific grazing unit, there will be no security base. The banks could no longer take collateral assignments on permits and those already issued would be rendered useless.

Improvements paid for by boprrowers [sic] on Federally permitted ranches would no longer be possible as the lending institutions could not justify the long term expense necessary when the government does not recognize a long term commitment to the permittee.

Standard practice has been that the seller must transfer the public land permit including the structural range improvements, such as, fences, windmills, corrals, etc. to the buyer. In doing so, the bank must file a collateral assignment on those permits as security for those loan funds. Required procedure dictates that lien position be established and legally recorded for all property held as security for notes issued by lending institutions. As I am sure you are aware, FDIC audits the banking institutions regularly, with their primary concern being the ratio between security value and monies loaned. That is, net

worth. The stability of the bank and the economy in general is based on this concept.

By assembling all the loans on our books which are either partially or completely secured with Federally Permitted operations, we have determined that 95% of these loans will be subject to "CLASSIFICATION" by FDIC. Should that be allowed to happen, all banks participating in this type operation will be unstable and in danger of default to the Federal Reserve. In direct correlation with these created insolvencies are those of the agriculture related businesses that depend on the solvency of the public land ranching operations here in the West.

I have attached a sampling of loans showing the impacts of the indicated changes in one of our branch banks. I believe this example is indicative of the majority of lending institutions engaged in agriculture lending. Every opportunity to inform other institutions to do the same is ongoing.

In general, we have determined the effect of the permit ranches on the economy here runs in the neighborhood of $125.00 per animal unit per year. Businesses affected by the loss of Federal land ranches include, but are not limited to; feed stores, supply stores, fuel suppliers, utilities, finance companies, banks, repair shops, vehicle and equipment dealers, and food service establishments. These are all vital to the infrastructure of our small western communities. In addition, the tax base of these communities is eroded by the reduction of livestock numbers and ranch equipment on the tax roles.

In 1997-1998 we have not made one Federal land ranch loan. In prior years we averaged eight to ten of these

loans. We have not continued to lend in this industry because Farm Services Agency (FSA) has set a policy which now requires 25% private land in any grazing allotment before it will consider a loan. This has effectively dried up the industry in our area of the state. We no longer get applications which tells us these ranches are not selling. We believe the reason for this is because there is no financing available other than owner financing. In light of this there is no flexibility for new owners to get established as they were able to do through bank financing in the past.

Your interest in addressing this issue is commendable. It is refreshing to hear from you again and I applaud your commitment to our friends in agriculture. I will forward additional information as it becomes available.

Sincerely,

/s/ Don Kidd
Don Kidd
Presikdent [sic] and CEO

DK:bjb

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, ET AL.,

Plaintiffs/Appellees

v.

BRUCE C. BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

AFFIDAVIT OF ADAM C. POLLEY

I, Adam C. Polley, do hereby swear on oath as follows:

1. My name is Adam C. Polley.
2. My address is P.O. Box 508, Reserve, New Mexico 87830. My telephone number is (505) 533-6423.
3. I currently serve as County Manager for Catron County in the State of New Mexico. I have served in this capacity since 1987. Before I came to my present position, I was a Professor at Western New Mexico University for approximately nine (9) years. Prior to my appointment as a Professor, I was a vocational agriculture teacher at Cobree Consolidated Schools in Bayard, New Mexico.
4. I received my Masters Degree in Agriculture with a specialty in Agricultural Economics from New Mexico State University.

5. I presently serve as Treasurer for the Arizona and New Mexico Coalition of counties for Stable Economic Growth. I was part of a team appointed by the Lieutenant Governor to prepare an Environmental Impact Statement ("EIS") regarding Bureau of Land Management ("BLM") grazing policy in the State of New Mexico. The purpose of the EIS was to measure the effects of the 1995 range reform regulations, and to provide alternative management approaches. My role was to review the effects of the each alternative on the financial viability of livestock operations.

6. I am confident that the 1995 permitted use rule, upheld by the Tenth Circuit in *Public Lands Council v. Babbitt*, will gradually lead to significant decreases in the number of permitted animal unit months ("AUMs"). This rule appears to be driven by the general policy of the BLM to continually decrease livestock numbers on federal lands. These decreases will inevitably put the financial viability of BLM dependent ranches at risk.

7. If the permitted use rule does result in livestock reductions on federal lands, Catron County, and other western counties, will receive fewer funds. Catron County, for example, receives a share of BLM grazing fees. In the 1995-96 financial year, Catron County received $15,609 from grazing fees. Catron County also utilzes a head tax on livestock. In the 1996 financial year, this tax produced $38,766.57. The rule vesting title to range improvements in the federal government will deprive Catron County of property taxes on those improvements that it might have collected from private owners.

8. The livestock head tax, unlike most of our other revenue, is unrestricted, meaning that the county can allocate it wherever it is most needed. If livestock numbers on BLM lands were reduced, Catron County

would be forced to make significant reductions in some of its most basic and essential services, including: road maintenance, predator control (which has already suffered cuts due to revenue shortages), land and resource projects for soil conservation, senior citizens and community centers, and employee salaries. Catron County is currently on the threshold of being forced to make cuts in these important services because of a shortage of unrestricted funds. Reductions in livestock numbers would further exacerbate an already serious problem.

9. The rule vesting title to future range improvements in the federal government will discourage permittees from investing in range improvements necessary to protect the environment.

10. Because livestock permittees no longer have incentives to make range improvements, the number of improvements made to federal rangelands will decrease, thereby depriving local merchants of revenue from the sale of raw materials for such improvements.

11. The rule permitting people not engaged in the livestock business to hold grazing permits opens the possibility of inexperienced individuals, with no knowledge of range management, holding permits to graze livestock and ignorantly causing ecological harm to the range.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Adam C. Polley
Adam C. Polley

STATE OF New Mexico)
) ss.
COUNTY OF Catron)

The foregoing instrument was acknowledged before me this 29th day of October, 1998 by Adam C. Polley.

Witness my hand and official seal.

[SEAL]

/s/ Mary M. Illegible
Notary Public

My Commission Expires: Feb. 21, 2000